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Supreme Court of the United States

OCTOBER TERM, 1956

~~No. 833~~ 90

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, AND JACK BENNY, PETITIONERS,

vs.

LOEW'S, INC. AND PATRICK HAMILTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 13, 1957

CERTIORARI GRANTED APRIL 29, 1957

No. 14928

United States
Court of Appeals
for the Ninth Circuit

JACK BENNY, Appellant,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON, Appellees.

COLUMBIA BROADCASTING SYSTEM, INC., and AMERICAN TOBACCO COMPANY, Appellants,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON, Appellees.

Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court, Southern District of California, Central Division

Civil No. 15602

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON, Plaintiffs,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation; COLUMBIA BROADCASTING SYSTEM, INC., OF CALIFORNIA, a corporation; AMERICAN TOBACCO COMPANY, a corporation; JACK BENNY, JOHN DOE; RICHARD ROE; CORPORATION ONE; CORPORATION TWO; CORPORATION THREE; DOE and ROE, a co-partnership; BROWN and BLUE, a co-partnership, Defendants.

COMPLAINT

(Infringement of Copyright and Unfair Competition)

Plaintiffs complain of the above-named defendants as follows:

First Count

I.

This cause arises under the Copyright Laws of the United States and is, therefore, a case of which this Court has jurisdiction under and by virtue of the provisions of Title 28, section 1338(a) of the United States Code. [2]

II.

At all times herein mentioned plaintiff Loew's

Incorporated (hereinafter for convenience referred to as "Loew's") has been and is now a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and duly qualified to transact and transacting business in the State of California and within the Southern District of California.

III.

At all times herein mentioned defendant Columbia Broadcasting System, Inc. has been and is now a corporation duly organized and existing under and by virtue of the laws of the State of New York and duly qualified to transact and transacting business in the State of California and within the Southern District of California. At all times herein mentioned defendant Columbia Broadcasting System Inc. of California has been and is now a corporation duly organized and existing under and by virtue of the Laws of the State of California and transacting business within the Southern District of California.

IV.

At all times herein mentioned defendant American Tobacco Company has been and is now a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey and duly qualified to transact and transacting business in the State of California and within the Southern District of California.

V.

At all times herein mentioned defendants Corporation One, Corporation Two and Corporation

Three, and each of them, have been and are now duly organized corporations doing business in the State of California and within the Southern District of California; and defendants Doe and Roe, and Brown and Blue, and each of them, have been and are co-partnerships, composed of persons whose names are unknown to plaintiffs, doing business in the State of California and [3] within the Southern District of California under firm or common names which are unknown to plaintiffs. Defendants John Doe, Richard Roe and the other defendants in this paragraph V named are sued herein under fictitious names for the reason that their true names are unknown to plaintiffs; but their true names will be inserted herein when they are ascertained.

VI.

Prior to March 26, 1946 plaintiff Patrick Hamilton created and wrote an original dramatic composition or play entitled "Gas Light" and plaintiff Loew's created and produced an original motion picture photoplay entitled "Gas Light" based upon and adapted from said play.

VII.

On or about March 26, 1946 Loew's complied in all respect with the copyright laws of the United States and all other laws thereof governing copyright, and secured the exclusive rights and privileges in and to said motion picture photoplay, and received from the Register of Copyrights a certificate of registration therein and thereto. At all times material herein Loew's has been and still is

the proprietor of all rights, title and interest in and to said copyright.

VIII.

On or about January 1, 1952 defendants produced a play entitled "Gas Light" which they copied in substantial part from the motion picture photoplay "Gas Light" without the knowledge or consent of plaintiffs. Since that time defendants, without consent of plaintiffs, have produced and performed and permitted others to perform said play, under the title "Gas Light" upon television, have broadcast and telecast and have caused and permitted others to broadcast and telecast said performance over television to the public throughout the United States; have photographed, reproduced and [4] recorded said performance upon motion picture film and have performed, displayed, produced and exhibited said motion picture, recordation and production of said performance; and have caused and permitted others to perform, display, produce and exhibit said motion picture recordation and production of said performance to the public throughout the United States; all for the purpose of profit to defendants. Defendants, unless restrained and enjoined by this Court will continue so to perform, display, produce and exhibit said performance and the motion picture recordation and production thereof.

IX.

On or about January 30, 1952 Loew's notified defendants that they had and were infringing Loew's said copyright but defendants continued and continue to infringe said copyright.

X.

By reason of their bulk it is impractical to attach a copy of the copyrighted work or of the infringing work hereto, but copies thereof will be made available and exhibited to the Court at all appropriate proceedings herein.

Second Count

I.

Plaintiffs refer to paragraphs I to VIII, both inclusive, and paragraph X of their first count herein and incorporate the same by reference.

II.

On June 9, 1953 defendants announced, and plaintiffs first learned, that commencing on June 11, 1953 defendants planned and intended to produce a motion picture photoplay entitled "Gas Light" based upon and copied in substantial part from the motion picture photoplay of which Loew's is the copyright proprietor, and to distribute, perform, display and exhibit said copied motion picture [5] photoplay to the public throughout the United United States for profit to themselves, and plaintiffs are informed and believe and therefore allege that unless restrained by this Court defendants will proceed so to do.

III.

On June 9, 1953 Loew's notified defendants that the announced and intended acts hereinabove in paragraph II of this count alleged would be and are an infringement of its said copyright, but de-

fendants, as plaintiffs are informed and believe, continue and will continue to proceed with said acts.

Third Count

I.

Plaintiffs refer to paragraphs I to IX, both inclusive of their first count herein, and paragraphs II and III of their second count and by said reference incorporate them herein.

II.

For many years Loew's has used and still uses the trade-name of Metro-Goldwyn-Mayer as the name and designation of its motion pictures. Said trade-name has acquired, for many years has had and now has a secondary meaning throughout the United States and the world, as designating, referring to and identifying only motion pictures produced, released, distributed and exhibited by Loew's.

III.

The motion picture photoplay "Gas Light" of which Loew's is the copyright proprietor, was and is being extensively released, distributed, performed, displayed, exhibited, advertised and exploited throughout the United States and the world under said title. Said title has acquired and at all times material herein has had and now has a secondary meaning throughout the United States and elsewhere, as designating, referring to and identifying only the [6] motion picture photoplay of that title produced by Loew's as aforesaid.

IV.

In connection with and as part of the acts herein complained of defendants have used and will continue to use said trade-name "Metro-Goldwyn-Mayer" and said title "Gas Light" as designating, referring to and identifying the performance and the reproductions and recordations thereof hereinabove complained of, to the irreparable damage of Loew's.

Wherefore, plaintiffs pray that:

1. A temporary restraining order be issued herein enjoining and restraining defendants, their agents, representatives, licensees, employees and servants, and each of them, pending the hearing of an application for a preliminary injunction, from producing, recording, photographing or publicly performing, displaying, exhibiting or otherwise infringing Loew's copyright therein and from using in any manner the trade-name "Metro-Goldwyn-Mayer" or the title "Gas Light" or any colorable copy, simulation or imitation thereof.

2. An order to show cause be issued herein directing defendants to be and appear before this Court at a time and place to be fixed in said order, to show cause why they should not be enjoined and restrained pendente lite as hereinabove in paragraph 1 of this prayer specified.

3. Defendants, their agents, representatives, licensees, servants and employees be permanently enjoined as hereinabove in paragraph 1 of this prayer specified.

4. Defendants be required to pay plaintiffs such damages as the latter has sustained by reason of defendants' acts and to account to plaintiffs for all gains, profits and advantages derived from said acts, or any of them. [7]

5. Plaintiffs have such other and further relief as to the Court may seem proper.

LOEB & LOEB,
/s/ By HERMAN F. SELVIN,
/s/ By ALLEN E. SUSMAN,
Attorneys for Plaintiffs [8]

[Endorsed]: Filed June 10, 1953.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon reading and filing the complaint, and the affidavit of R. Monta, herein, and good cause therefor appearing,

It Is Ordered that the defendants herein be and appear before this Court at its courtroom in the United States Postoffice and Court Building, Los Angeles, California, on the 19th day of June, 1953, 10 a.m., then and there to show cause, if any they have, why an injunction pendente lite should not be issued as in said complaint prayed.

And, it appearing from said complaint and affidavit that [9] said defendants threaten to commit

certain acts which will be an infringement of the copyright of plaintiff Loew's Incorporated in and to a motion picture photoplay entitled "Gas Light" and that said acts will be completed before a hearing on an application for an injunction pendente lite can be had, thereby causing irreparable injury to said plaintiff,

It Is Further Ordered that, until June 19th, 1953, 5 p.m., said defendants, their agents, representatives, licensees, employees and servants, and each of them, be and they hereby are, and each of them is, enjoined and restrained from producing, recording, photographing, or publicly performing, distributing, releasing, displaying or exhibiting said motion picture photoplay "Gas Light" or any colorable copy, imitation or simulation thereof; and from using in any way the name "Metro-Goldwyn-Mayer" or the title "Gas Light" or any colorable copy, imitation or simulation thereof or of either of them.

It Is Further Ordered that the foregoing temporary restraining order shall not be effective until plaintiffs, or either of them, have given security in the amount of $1,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Dated and Issued: June 10, 1953 at 1:45 o'clock p.m.

/s/ JAMES M. CARTER,
District Judge

The security hereinabove provided for has been given.

Dated: June 10, 1953.

/s/ JAMES M. CARTER,
District Judge [10]

[Endorsed]: Filed June 10, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF RUDOLF MONTA

County of Los Angeles,
State of California—ss.

Rudolf Monta being first duly sworn deposes and says:

I am the executive of Loew's Incorporated (hereafter referred to as Loew's) in charge of problems pertaining to rights in literary, dramatic and musical properties. I am familiar with the matters hereinafter set forth.

In the year 1944 Loew's produced and thereafter released throughout the United States and in many foreign countries a feature length motion [11] picture entitled "Gaslight", at a cost to Loew's in excess of Two Million Dollars ($2,000,000.00). The picture enjoyed wide commercial and artistic success and is generally recognized as one of the finest motion pictures ever produced.

On many occasions Loew's, as well as other motion picture companies, release motion pictures for

later. distribution and exhibition after initial release. The right to such later performances, referred to generally in motion picture business as re-releases, is of great value to the owner of the picture. Moreover, it is a frequent occurrence in the motion picture business for the owner of a picture of merit such as "Gaslight", to remake the picture using varying portions of the original picture, and remake rights are recognized as being of great value to the owners of such pictures. Furthermore, use of motion pictures and of the various rights incident thereto in entertainment media other than motion picture exhibition is recognized in the motion picture industry as being of great value, particularly in connection with a successful motion picture such as "Gaslight".

In the year 1944 Loew's duly and regularly obtained a statutory copyright in the United States and copyright throughout numerous other parts of the world on its picture "Gaslight" and ever since Loew's has been and it now is the copyright owner thereof.

On or about January 27, 1952 the Jack Benny Television Program, which was and still is sponsored by the American Tobacco Company, and which was shown over the nationwide television facilities of the Columbia Broadcasting System, by way of both a "live show" or direct broadcast, as well as by way of a "kinescope" or motion picture filming, was largely devoted to performance of a television version of "Gaslight". Said use of "Gas-

light" on the Jack Benny program was made without Loew's knowledge or consent.

The aforesaid conduct of Mr. Benny, the American Tobacco Company, and the Columbia Broadcasting System, Inc., constituted and constitutes an infringement of Loew's rights in and to "Gaslight", as is made evident from the "Revised Script" of said television program and the [12] "Dialogue Cutting Continuity" of "Gaslight", true and correct copies of both of which documents are being lodged with the Court concurrently herewith. Further, and for the purpose of ready reference by the Court, there is attached as Exhibit "A" hereto and incorporated herein, an outline of some of the prominent similarities between the television performance and Loew's motion picture.

Following the aforesaid television exhibition of January 27, 1952 Loew's promptly notified said defendants that it had learned of said infringement and that it intended to protect its legal rights in the premises.

No further use, or contemplated use, by defendants, after the exhibition of January 27, 1952 of "Gaslight" was known to Loew's until Tuesday, June 9, 1953. On that date an article appeared in the "Daily Variety", a well known publication devoted to news of the entertainment business, regarding defendants' intention to make further use for their profit, and in derogation of Loew's rights, of "Gaslight". A true and correct copy of said newspaper article is attached hereto as Exhibit "B" and

is incorporated herein by this reference. The action of defendants referred to in said article has been and is without Loew's consent.

Immediately upon reading said newspaper article, Loew's sent to Jack Benny, American Tobacco Company, and the Columbia Broadcasting System, Inc. a telegraphic notice advising said defendants that their use of "Gaslight" constituted an unlawful invasion of Loew's rights and that all proper measures would be taken in protection thereof. A true and correct copy of said telegram is attached hereto as Exhibit "C" and is incorporated herein by this reference.

Up to the time of execution of this Affidavit none of said defendants has replied to said telegraphic notice or has advised Loew's that the production referred to in the Daily Variety article will not proceed as there set forth.

I am informed and believe and therefore state that normally production of a picture such as that referred to in the Daily Variety article requires only one day to complete, and that unless a temporary [13] restraining order enjoining defendants and each of them from proceeding with their contemplated production is issued forthwith defendants will go forward with their said production of "Gaslight" and will thereby cause great and irreparable injury to Loew's in that its reissue, remake and other rights in and to "Gaslight" will be substantially decreased in value, and by reason of the matters heretofore set forth in this Affidavit and in the

Complaint herein. Furthermore the issuance of said restraining order will preclude any contention by defendants that Loew's has not proceeded with all due dispatch, and will maintain and preserve the respective rights of the parties without unnecessary expenditure by defendants of substantial sums for production costs and until such time as a full and complete determination may be had of the issues herein.

/s/ RUDOLF MONTA

Subscribed and Sworn to before me this 10th day of June, 1953.

[Seal] /s/ ALICE L. BAKER,
Notary Public in and for said
County and State [14]

Similarities between Jack Benny television version of "Gaslight" and Loew's Incorporated motion picture.

I. Generally

	BENNY TV PROGRAM	MGM's "GASLIGHT"
1.	Locale: London (p.6)	London (p.1)
2.	Period: 1871 (p.6) when story begins.	"Early 1870's" when story begins.
3.	Main setting: Gloomy old 4-story house. (p.6)	Gloomy, old 4-story house (p.1)
4.	Characters:	
	(a) Husband "CHARLES Manningham" (played by Benny) murdered a woman 15 years ago in this very house; married present wife so that "in the guise of an English gentleman" he can pursue search for jewels of murdered woman. He is following plan of driving his wife insane. He goes out nightly, sneaks back into attic to search. Is finally captured by man from Scotland Yard.	(a) Husband, "Gregory Anton" (played by CHARLES Boyer) murdered a woman 10 years ago in this very house; married present wife (who inherited house) so he can pursue search for jewels of murdered woman. He is following plan of driving his wife insane. He goes out nightly, sneaks back to attic to search. Is finally caught by man from Scotland Yard.
	(b) Wife, "BELLA Manningham" much in love with husband; pained that he leaves her alone night after night; worried she is losing mind; asks for his sympathy; she is victim of husband's plan to drive her insane; learns of husband's past when Inspector visits her; asks to see husband alone before he is taken away, and taunts him then calls Inspector.	(b) Wife, "PAULA Anton" much in love with husband; pained that he leaves her alone nightly; fears that she is losing mind; asks for husband's sympathy; Ditto.
	(c) Scotland Yard Inspector. "INSPECTOR" (Played by Noble) Has been watching house for some time; comes to call on wife when husband out; tells her of husband's past, the murder of a woman in this house years ago; in talking with wife, Inspector gets her to admit she knows it is her husband prowling in the attic who makes strange noises there at night. Upon return of husband, Inspector has hidden, but appears when husband is bullying wife; places husband under arrest; allows wife to talk with husband alone a few moments while he waits outside door, then at her call, comes back and takes husband away into custody. We feel there is affection between Inspector and wife.	(c) Scotland Yard Inspector "Brian Cameron" (Played by Joseph Cotten) Ditto.

(d) Maid "ELIZABETH" questioned by husband about picture out of place; denies touching it.	(d) Maid "ELIZABETH" Ditto.
(e) Other servant in house: Butler, "Jeeves".	(e) Other servant in house: Maid, "Nancy".

II. Story Points.

5.

(a) Husband pursuing a sinister, diabolical scheme to drive wife crazy. (p.7 TV) (p. 102 script)

(b) Husband murdered a woman years ago in this very house. (p.17TV) (p.102 script)

(c) Husband marries present wife, comes to this very house, so he can search for jewels of murdered woman, in attic. (p.17 TV) (p.105 script)

(d) In order to search, husband leaves wife night after night, and pretends he is going elsewhere, actually coming back to own attic. (p.14,15 TV) (p.65,65A,65B,script)

(e) Husband's method of driving wife insane, includes following -

(1) Telling her she is always forgetting things:
TV program: Wife "doesn't remember" things she does, husband tells her, p.9,12,14,21.
MGM script: Wife inclined to lose things and forget things, husband tells her, p.35,43,59,[illegible]A.

(2) Puts picture(s) out of place, then accuses wife of having done this and forgotten it:
TV program: Turns 2 pictures upside down. (p.11,12)
MGM script: Takes little picture off wall and hides it. (p.60,61)

(3) Confines wife to her room, and he goes out night after night.
TV program: p.14,15,7,10.
MGM script: p.64,65,65A.

(4) Humiliates wife in front of servant(s) by calling her in to be questioned when picture found out of place.
TV program: p.12 (Maid, Elizabeth, is quizzed)
MGM script: p.61,60 (Maids, Elizabeth and Nancy are quizzed)

(5) Husband's searching for jewels in attic, has following effects which increase idea of wife's insanity:

(a) When he turns on gaslight in attic, lights in her room go lower; then later when he turns off gaslight in attic, her lights in her room come up higher again.
TV program: Lights go dim, p.16; lights up again, p.18.
MGM script: " " " p.97; " " " p.98.

(b) His search in attic (makes queer noises) (has queer effect).
TV program: Wife complains of headaches, but when Inspector explains her husband was up in attic searching for jewels she says her headache is gone.
MGM script: Wife thinks she's hearing imaginary footsteps in attic.

(f) Husband calls in servants, after he has misplaced picture, questions them, in order to cast suspicion on his wife. (p.12 TV) (p.60,61 script)

(g) Husband tells wife she is getting hysterical, and should sit down and calm herself: (p.10,11 TV) (p.61 script)

(h) Husband asks why wife does these crazy things; says she is insane:
(p.12,21 TV) (p.82 script)

(i) Running idea that wife forgets things:
(p.9,12,14,21 TV) (p.35,43,59,83A script)

(j) Gimmick of gaslights going down after husband leaves, and coming up just before he returns:
(p.16,18 TV) (p.97,98 script)

(k) Running gag and whiplash tagline: "WELL!"
(p.4, TV and was at end of film we saw, but not written into script of the TV show) Benny & Noble;
(p.13,48,93,127 script)

(l) Wife pleads for sympathy and kindness from husband:
(p.10 TV) (p.65,65A script)

(m) Inspector from Scotland Yard, has been watching house, comes to visit wife when husband out, tells her of husband's dark past, reassures her of her sanity, captures husband,
(p.17,18,19,23 TV) (p.44-48,50,58,59,93 script)
(I) Watching house - (p.17 TV) (p.44-48,50,59,93,96 script)
(II) Visits wife: (p.17 TV) (p.93 script)
(III) Tells of husband's crime (p.17 TV) (p.102 script)
(IV) Reassures wife of sanity- (p.19 TV) (p.96 script)
(V) Captures husband (p.23 TV) (p.117 script)

(n) Husband returns, starts to bully wife again, when Inspector comes on scene.
(p.23 TV) (p.112,113 script)

(o) Wife asks to speak to husband, alone before Inspector takes him away; Inspector finally agrees and waits outside room within call. (p.24 TV - Inspector ties up husband because wife asks to talk with him alone)
(p.117,118 script - Inspector already had tied husband up.)

(p) Husband, tied up in chair, tries to talk wife into getting knife and cutting him loose.
(p.24,25 TV - knife in desk)
(p.119 script - knife in cupboard)

(q) Wife pretends she is going to release husband by cutting bonds with knife, then frightens him by implying instead she will kill him with the knife, then calls Inspector.
(p.25,26 TV) (p.121,122 script)

III. Dialogue.

BENNY TV PROGRAM	MGM's "GASLIGHT"
(a) Husband tells wife she is hysterical and should calm herself: p.10,11 dialogue: Husband: "Now, now Bella, control yourself. You're getting hysterical. I'll have the maid bring you a sedative."(Pulls bell cord) "Now just sit here for awhile and you'll feel much better."	p.61 dialogue: Husband: "Paula, will you stop being hysterical?" (He pulls bell cord) "Sit down and calm yourself before they come."
(b) Incident & dialogue re picture misplaced: p. 11, husband is talking to wife and pretending to be concerned about her welfare, when he stops talking, breaks off, starring:	p.60,61: husband is playing piano, pretending to be nice to wife, when he stops playing, asks her to "put things right again." "Look!"

(Similarities - Dialogue - Continued)

"That picture..that picture on the wall. Why did you turn it upside down?"
Wife: "Picture..upside..But I didn't..I didn't turn that picture upside down. It must have been someone else."
Then, on p.12 - Wife: "But I didn't do it, Charles..I told you..It must have been someone else."
p.12, husband says, "Someone else..Bella, are you suggesting the maid did it?"
Wife:"Yes,yes, the maid.."
Husband: "Very well, I'll find out. (he goes to bell cord).
Wife: "Charles, don't humiliate me in front of the servants, please."

Wife: "Yes, the little picture's been taken down. Who took it down? Why was it taken down?...But I haven't hidden it. I swear I haven't.. Why should I? Don't look at me like that. Someone else must have done it." "Oh, don't ring..Don't shame me before the servants!" (p.61)
Husband rings for servants, "WE must get to the bottom of this, once and for all.."Elizabeth comes in and he asks her if she notices anything missing.

(c) Husband quizzes maid about picture:
p.13: Maid:"Did you ring, Sir"
Husband: "Yes, Elizabeth..Those pictures on the wall. Did you turn them upside down?"
Maid: "Oh no, Sir. I never touched them."

p.61: Maid: "Do you want me, Sir?" Husband: Come in please, Elizabeth. Do you notice anything missing in this room..
p.62: Maid: "There's a little picture missing, Sir."
Husband: "Did you take it away?"
Maid: "Oh, no, sir."
Husband: "Have you ever taken it down from where it belongs?"
Maid: "No, sir. Why ever should I?"

(d) Husband goes out again after picture episode, leaving wife alone.
p.14: Wife, "Charles, Charles, you're not going out again, are you?"
Husband: "I have to. I have an appointment."..."At the tavern.."
p.15: Wife, "Charles, Charles. Every night he leaves me alone. I can't stand it any more.."
p.13:Wife, "Oh Charles, if the maid didn't turn the picture upside down, then I must have done it..but I don't remember.."

p.65-65A:Wife: "What are you going to do?" Husband: "I'm going out, to work, and to forget all this."
p.65B:Wife: "No,don't! Dont' leave me here all by myself now. I get so frightened here alone when you go out night after night." "Don't leave me. Stay with me.."
65A: Wife, "Gregory, if it was I who took that picture... then I don't know what I do any more."

(e) Implications that wife going insane:
p.7: Butler: "She's an odd one, isn't she?" Maid: "The master says if she gets any worse, he's going to send her away to a loon."

p.47: Miss Thwaites: "definitely odd."
p.66: Maid says to husband: "Seems to be getting worse, doesn't she sir?":

p.83A: Husband: "You've forgot-
ten him as you forget everythi
I am wrong to try to handle th
myself. The case is one for
people who know about such
things, Paula, we shall have
visitors - and shortly".
Wife: "A doctor?"
Husband, "Two, I think <u>two</u> is
the required number."
p.90: Policeman on beat tells
Scotland Yard man, that he had
breakfast in the kitchen of
Anton house...
"If you ask me, Nancy" (the
maid)'s getting ideas about 'er
station. It seems <u>the master 'ad
told 'er that 'er mistress might
be going away for quite a long
time</u>.."
p.112: Wife: "My mind is going"
Husband, "Haven't I told you?"

p.21: Husband: "You might as
well admit it, Bella, you're
losing your mind. Let me send
you away".

(f) <u>Wife confined to room by husband</u>:

p.7: Butler, "I thought the mas-
ter wanted Mrs. Manningham to have
supper in her room".

p.10: Husband, "What are you
doing out of your room? Answer
me, Bella, what are you doing
out of your room?"
Wife:"..I've been confined to my
room all day and it was driving
me mad..."

p.64: Husband, "And now, Paula,
I think you'd better go to
your room".
(She asks him to bear with her,
be kind..)
Husband: "Come Paula, you had
better go to your room."
(p.65-65A)

(g) <u>Wife pleads for sympathy, kindness
from husband, if she is going insane</u>:

p.10: Wife: "I need your sympathy..
your help..your tender understand-
ing." "Oh, my darling, my beloved..
only you can guide me through the
darkness of my confusion. Only you can
make me smile again..."

p.65-65A: Wife: "Gregory,
if it <u>was</u> I who took that
picture...if I do all these
senseless meaningless thing
then I don't know what I do anymore
so meaningless-then, if that
true, then you must be
gentle with me - bear with
me. Please, Gregory please"

(h) <u>Husband asking why wife does these
crazy things, and saying she is insane</u>:

p.12 ; Husband: "<u>Why do you keep
doing these things</u>?"
"Bella, oh my poor Bella, <u>you're
losing your mind</u>. Why don't you
let me send you away? You keep
turning the pictures upside down
and don't even remember."
p.21: Husb: "You might as well
admit it, Bella, you're losing your
mind. Let me send you away..."

p.82: Husband: "If I could only
get inside that crazy brain of
yours, and understand <u>what makes
you do these crazy</u>, twisted
<u>things</u>."
Wife: "Gregory are you <u>trying
to tell me I'm insane</u>?"
Husband: "It's what I'm trying
not to tell myself."

(i) Running idea that wife doesn't remember things:

p.9: Wife: "I don't even remember ordering anything like that (marinated salami - for dinner).
p.8: Wife: "..doing things I don't even remember."
p.14: "Did you hear that, Bella. Then it was you who did it." (turned picture upside down).
Wife, "But I don't remember."
Husb: "Don't remember..don't remember, You didn't remember last week when you put the horse in the closet... or 2 weeks ago when you put glue in my shaving cup..."

p.21: Husb: "No,no Bella, you're the one who's crazy. You keep going around..and then say you don't remember."

Running idea that wife forgets things, loses things:

p.35: Husb: "You might lose it (the brooch). You know, you're inclined to lose things, Paula."
Wife,"I am? I never realized it".
Husb: "Just little things..Now, you'll remember where it is?"
p.43: Wife,"I don't remember opening my bag..You did put it in there?"
Husb: "Don't you remember even that?"
p.59, Wife,"Have I forgotten?" (that they were going out tonite)
p.83A-Husb: "You've forgotten him as you forget everything."

(j) Running gag, and whiplash finish "WELL!":-

Benny and Don Wilson argue over commercial Benny wants him to do; when Don objects, Benny says, "WELL!" and Noble rejoins, "WELL!" This is p.4, start of running gag.

Whiplash -tagline-by Barbara & (servant? or was it Inspector?) "WELL!" "WELL!" but not in TV script given us. Was in film we saw.

Miss Thwaites, nosey neighbor of wife's, had first met her on train from Milan to Como, and when girl gets off train, and Gregory meets her, Miss T. exclaims as she watches their long kiss, "WELL!" (p.13)
Miss T. is watching from her house, and sees Scotland Yard man enter wife's home; exclaims "WELL!" (p.48 & 93)
Miss T. gets into Anton house nite when police are taking husband away; sees wife and Scot. Yard man in intimate conversation, exclaims, "WELL!" as whiplash to picture. (p.127)

(k) Gaslight goes down after husband leaves then comes up just before he returns:

p.16: "the gas lights are going dim again..every night he leaves me, the lights go dim.."the lights have come up again-quick, hide.."

p.97: "Every night when my husband goes out.."The light goes down..Later the gas goes up again and he comes back."

continued.....

EXHIBIT "B"

VARIETY

Tues., June 9, 1953

Jack Benny Reprising "Gaslight" on Telefilm

Jack Benny will film a repeat of his TV "Gaslight" skit with Barbara Stanwyck at General Service Thursday as one of the five filmed shows to be interspersed with live telecasts for Luckies next season. He will do one filmed show every Thursday until the five are completed.

Benny kicks off the new TV season Sept. 13 simultaneously with his radio series. First two video shows will be live to be followed by a filmed show. He'll telecast every third week instead of this season's monthly schedule. [21]

EXHIBIT "C"

[Telegram]

Straight Wire June 9, 1953

Mr. Jack Benny
1002 North Roxbury Drive, Beverly Hills, Calif.

Columbia Broadcasting System, Inc.
6121 Sunset Boulevard, Hollywood, Calif.

American Tobacco Company
111 Fifth Avenue, New York, N. Y.

We are advised that a repeat performance or remake by you of the television version of "Gaslight" heretofore performed on the Jack Benny show of January 27, 1952 over the CBS television network

is now being contemplated. Notice is hereby given you that we consider the prior performance and any subsequent performances or remakes thereof to constitute infringements of our rights in and to "Gaslight", and that we intend to enforce such rights by all proper remedies afforded by law.

Loew's Incorporated
By Marvin Schenck, Vice-President

[Endorsed]: Filed June 10, 1953.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES

I.

The alleged copying of a substantial part of plaintiff's photoplay is, of course, an infringement of the copyright.

17 U. S. Code, sec. 1;
Universal Pictures Co. vs. Harold Lloyd Corp., 9 Cir., 162 F.2d 354, 359-361.

II.

Use of plaintiff's trade-name, and the title of its photoplay, both of which have acquired a secondary meaning, is actionable unfair competition.

Jackson vs. Universal Pictures Co., 36 Cal. 2d 116, 121; 222 P. 2d. 433, 436-437, and cases there cited. [23]

III.

Injunction, in accordance with the general practice of equity, is an appropriate remedy to prevent as well as to restrain, copyright infringement; and the circumstances of this case require its use pendente lite.

17 U. S. Code, sec. 112;

Chappell and Co. vs. Fields, 2 Cir., 210 Fed. 864, 866 stating that "Preliminary injunctions are granted more readily in dramatic than in other cases because the delay involved in waiting for a final decree would generally amount to a denial of justice."

American Code Co. vs. Bensinger, 2 Cir., 282 Fed. 829, 835, stating that "Where the plaintiff has made a prima facie case in regard to the existence of a copyright and its infringement, a temporary injunction will, as a general rule, be issued * * *".

Respectfully submitted,

LOEB & LOEB,
/s/ By HERMAN F. SELVIN,
Attorneys for Plaintiffs [24]

[Endorsed]: Filed June 10, 1953.

[Title of District Court and Cause.]

ORDER MODIFYING TEMPORARY RESTRAINING ORDER

The parties appearing herein having entered into an oral stipulation in open court on June 11, 1953

with respect to modification of the temporary, restraining order heretofore issued by the Court on June 10, 1953, and the Court having orally approved said stipulation in open court,

Now, therefore, in accordance with said stipulation, and good cause therefor appearing,

It Is Ordered as follows:

1. Said stipulation for modification of said temporary restraining order, and this order of modification on, and each of them, is made without prejudice to any of the rights of the parties hereto.

2. This order of modification shall be deemed effective [25] as of 12 o'clock noon, June 11, 1953.

3. Defendants may produce, on June 11, 1953, before a studio audience only, a motion picture photoplay starring Jack Benny, which photoplay is claimed and alleged by plaintiff herein to constitute an infringement of the copyrighted motion picture "Gaslight", of plaintiff Loew's Incorporated.

4. The entire negative film of said Jack Benny photoplay of June 11, 1953 shall be delivered forthwith to the Hollywood, California film laboratories of Consolidated Film Industries, a division of Republic Pictures Corporation, shall be processed into a developed film negative at Consolidated Film Industries, shall be sealed immediately thereafter, and shall remain in the safekeeping and custody of Consolidated Film Industries at its Hollywood, California film vaults, until such time as this Court may otherwise order.

5. No prints or additional negative films what-

soever of said original developed negative film shall be made, until such time as this Court may otherwise order.

6. All scripts of said Jack Benny photoplay of June 11, 1953 shall be forthwith taken into and shall remain in the custody of defendants and/or their attorneys, except for such copies thereof as may be filed in Court or delivered to plaintiffs and/or their attorneys.

7. Except as otherwise expressly set forth in this order of modification, said temporary restraining order of June 10, 1953 shall remain in full force and effect.

Dated: June 12, 1953.

/s/ JAMES M. CARTER,
District Judge [26]

Approved as to form: Dated: June 12, 1953.

O'Melveny & Myers,

/s/ By W. B. Carman,
Attorneys for Defendants, Columbia Broadcasting System, Inc., and Columbia Broadcasting System, Inc. of California.

Wright, Wright, Green & Wright,

/s/ By Richard M. Goldwater,
Attorneys for Defendant Jack Benny

Loeb & Loeb,

/s/ By Harry L. Gershon,
Attorneys for Plaintiffs [27].

[Endorsed]: Filed June 12, 1953.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT JACK BENNY

Defendant, Jack Benny, for answer to the complaint herein, admits, denies and alleges as follows:

First Count

1. Denies each and every allegation contained in Paragraph I of said count except as follows: Admits that the claims stated in the first and second counts of the complaint arise under the laws of the United States relating to and governing copyrights.

2. Alleges that this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs V, VI and VII of said count, and each of them, except as follows: Admits that prior to March 26, 1946, plaintiff Loew's produced a motion picture photoplay entitled "Gaslight".

3. Denies each and every allegation contained in Paragraph [28] VIII of said cause of action, except as follows: Admits and alleges that on or about January 27, 1952, defendant American Tobacco Company sponsored, defendant Columbia Broadcasting System, hereinafter called "CBS" produced, and defendant Jack Benny performed in a play which was a burlesque of a motion picture photoplay entitled "Gaslight", and that said defendant CBS caused said burlesque to be shown over the television facilities of said defendant either at the time of said production or shortly thereafter by means of a television recording; alleges that on or

about June 11, 1953 defendant American Tobacco Company sponsored, defendant CBS produced, and defendant Jack Benny performed in a motion picture photoplay which was caused to be filmed by defendant CBS, as permitted by the order of the above entitled court, for the purpose of showing said photoplay over the television facilities of said defendant CBS; that said moton picture photoplay was a burlesque of the motion picture photoplay entitled "Gaslight"; that defendant CBS will, unless restrained and enjoined by this court, broadcast said burlesque over its television netword facilities; that the foregoing was done by defendants CBS, American Tobacco Company and Jack Benny, and each of them, for the purposes, among others, of entertainment of the public and profit to themselves.

4. Denies each and every allegation contained in Paragraph IX of said cause of action.

Second Count

5. Answering Paragraph I of said count, this answering defendant incorporates herein Paragraphs 1, 2 and 3 above as if fully set forth.

6. Denies each and every allegation contained in Paragraph II of said cause of action, except as follows: Admits and alleges that on or about June 11, 1953 defendant American Tobacco Company [29] sponsored, defendant CBS produced, and defendant Jack Benny performed in a motion picture photoplay which was a burlesque of the motion picture photoplay entitled "Gaslight". Alleges that this

answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations that Loew's, Inc. is the copyright proprietor of said motion picture photoplay entitled "Gaslight". Admits and alleges that defendant CBS plans and intends to display and exhibit said burlesque over its television network facilities for the purposes, among others, of entertainment of the public and profit to itself, and that defendant CBS will proceed to do so unless restrained by the above entitled court.

7. Denies each and every allegation contained in Paragraph III of said cause of action, except as follows: Admits and alleges that on or about June 9, 1953 plaintiff Loew's, Inc. addressed a telegram to defendants Jack Benny, CBS and American Tobacco Company, which reads as follows:

"We are advised that a repeat perfomance or remake by you of the television version of 'Gaslight' heretofore performed on the Jack Benny Show January 27, 1952, over the C.B.S. Television Network is now being contemplated. Notice is hereby given you that we consider the prior performance and any subsequent performances or remakes thereof to constitute infringements of our rights in and to 'Gaslight', and that we intend to enforce such rights by all proper remedies afforded by law."

Third Count

8. Answering Paragraph I of said cause of action, this answering defendant incorporates herein

Paragraphs 1, 2, 3, 4, 6 and 7 above, and each of them, as if fully set forth.

9. Alleges that this answering defendant is without knowledge or information sufficient to form a belief as to the truth [30] of the allegations contained in Paragraph III of said count.

10. Denies each and every allegation contained in Paragraph IV of said count, and specifically denies that plaintiff has been or will be damaged as alleged, or otherwise, or at all.

As and for his Affirmative Defenses herein, this Answering Defendant alleges:

First Defense to First, Second and Third Counts:

11. The play and motion picture photoplay complained of in said Complaint were burlesques of, and amounted to no more than fair use and fair criticism of, said motion picture photoplay of Loew's. No one viewing either the said play or the said photoplay complained of could reasonably believe he was viewing said photoplay of Loew's, or any part thereof; and the public showing of the said play and the said photoplay complained of did not and will not, satisfy in whole or in part any demand that may have existed, or that may now or hereafter exist, for said photoplay of Loew's.

Second Defense to First, Second and Third Counts:

12. Burlesque is a form of literary art which is as old as literature itself and its traditions are unbroken over the centuries. It has always been ac-

cepted and sanctioned as an established mode of literary criticism.

Burlesque, as a form of literature, characteristically takes serious elements from the subject of the burlesque and puts them into absurd or nonsensical form, using the comic tricks of exaggeration, inversion, inflation, deflation and transposition. It frequently uses the story or parts of the story of the work which is the subject of the burlesque and incidents and characters from such work, all of which it puts into absurd or nonsensical [31] form. The new form created by a burlesque has been recognized throughout the history of literature, as a form of literary art distinct and different from the literary work which is the subject of the burlesque.

Burlesque is a form of freedom of expression which flourishes in those societies where there is the most democratic liberty. There have been very few important plays, novels, verses or stories that have not been burlesqued at least once during their lifetime. Through the long millennia of western civilization the stage has always laughed at itself using burlesque as the vehicle for such laughter.

13. Burlesquing of motion pictures has, for many years, been an accepted custom in the broadcasting of entertainment over the air. Numerous entertainers, including Jack Benny, Fred Allen, Sid Ceasar, Imogene Coca, Jimmie Gleason, Bob Hope and Henry Morgan, have merrily spoofed various motion pictures by presenting, over the air, burlesques of such pictures. Since 1932, Jack Benny programs have presented twenty-six burlesques of motion pic-

tures distributed by plaintiff Loew's, Inc. and fifty-eight burlesques of motion pictures distributed by one or the other of the following distributors of motion pictures: Universal, R.K.O., United Artists, Twentieth Century-Fox, Warner Bros., Columbia and Paramount.

Said programs were original, novel and unique comedy programs which appealed to listening and viewing audiences throughout the United States because of humorous situations, dialogue and antics presented by defendant Benny and his supporting cast. Said programs ordinarly extended for one-half hour of broadcasting time including commercials, monologue, repartee, singing and the burlesque.

14. On or about October 14, 1945 a Jack Benny program, sponsored by defendant American Tobacco Company, was presented [32] over the national radio network of the National Broadcasting Company which included a burlesque of the M-G-M motion picture "Gaslight." On or about January 27, 1952 a Jack Benny program, produced by defendant CBS and sponsored by defendant American Tobacco Company, was presented over the national television network of defendant CBS which included, with modifications, said burlesque of the M-G-M motion picture "Gaslight." On or about June 11, 1953 defendant American Tobacco Company sponsored and defendant CBS produced a Jack Benny program in the form of a motion picture which was filmed for the purpose of using it as one of a planned series of Jack Benny programs

to be broadcast over the national television network of defendant CBS between September, 1953, and June, 1954. Said Jack Benny program included, with further modifications, said October 14, 1945 burlesque of the M-G-M motion picture "Gaslight".

The burlesques of "Gaslight" contained in all of said programs were the original creations of writers skilled in the literary art of burlesque. The script of said October 14, 1945 program was prepared by writers then employed by defendant Benny. The scripts of said January 27, 1952 and June 11, 1953 programs were prepared by the same writers, plus two additional writers on the June 11, 1953 script, all of whom were then employed by defendant CBS. Said scripts were written and performed in a manner which was highly original and unique and did not and will not detract in any way from the motion picture "Gaslight".

15. The use made by this answering defendant of the motion picture "Gaslight" was a fair use and not a copying of said motion picture in that said defendant used said motion picture only as the subject of an original and unique burlesque of said motion picture. [33]

Third Defense to First, Second and Third Counts:

16. Plaintiffs are not entitled to maintain this suit or to assert infringement as alleged in the complaint by reason of laches in that defendant Benny first used the motion picture entitled "Gaslight" on October 14, 1945, as the subject of a burlesque. Plaintiff cooperated with and assisted defendant

Benny in such radio production. Plaintiffs did not protest the use of the motion picture photoplay "Gaslight" as the subject of a burlesque for more than six years and, until the filing of this action, did not make any attempt to obtain a judicial determination of their alleged rights with respect to the burlesque by defendants of said motion picture; defendants have relied upon such acquiescence and delay and have continued to use burlesques of said motion picture and have invested large sums in reliance thereon; by reason thereof plaintiffs are estopped to assert that the burlesquing by this answering defendant of the motion picture "Gaslight" constitutes an infringement of plaintiffs' alleged copyrights.

Wherefore, said defendant prays that plaintiffs take nothing by their action and that said defendant may have his costs of suit.

Dated: November 19, 1953.

WRIGHT, WRIGHT, GREEN and
WRIGHT, LOYD WRIGHT,
CHARLES A. LORING,

/s/ By CHARLES A. LORING,
Attorneys for defendant Jack
Benny [34]

Affidavit of Service by Mail attached. [35]

[Endorsed]: Filed November 19, 1953.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS COLUMBIA BROADCASTING SYSTEM, INC., AND AMERICAN TOBACCO COMPANY

Defendants Columbia Broadcasting System, Inc., hereinafter referred to as defendant CBS, American Tobacco Company, and each of them, for answer to the complaint herein, admit, deny and allege as follows:

First Count

1. Deny each and every allegation contained in paragraph I of said count except as follows: Admit that the claims stated in the first and second counts of the complaint arise under the laws of the United States relating to and governing copyrights. [36]

2. Allege that these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs V, VI and VII of said count and each of them except as follows: Admit that prior to March 26, 1946, plaintiff Loew's produced a motion picture photoplay entitled "Gaslight."

3. Deny each and every allegation contained in paragraph VIII of said cause of action, except as follows: Admit and allege that on or about January 27, 1952, defendant American Tobacco Company sponsored, defendant CBS produced, and defendant Jack Benny performed in a play which was a burlesque of a motion picture photoplay entitled "Gaslight," and that said defendant CBS caused

said burlesque to be shown over the television facilities of said defendant either at the time of said production or shortly thereafter by means of a television recording; allege that on or about June 11, 1953, defendant American Tobacco Company sponsored, defendant CBS produced, and defendant Jack Benny performed in a motion picture photoplay which was caused to be filmed by defendant CBS, as permitted by the order of the above entitled court, for the purpose of showing said photoplay over the television facilities of said defendant CBS; that said motion picture photoplay was a burlesque of the motion picture photoplay entitled "Gaslight"; that defendant CBS will, unless restrained and enjoined by this court, broadcast said burlesque over its television network facilities; that the foregoing was done by defendants CBS, American Tobacco Company, and Jack Benny, and each of them, for the purposes, among others, of entertainment of the public and profit to themselves. [37]

4. Deny each and every allegation contained in paragraph IX of said cause of action.

Second Count

5. Answering paragraph I of said count, these answering defendants incorporate herein paragraphs 1, 2 and 3 above as if fully set forth.

6. Deny each and every allegation contained in paragraph II of said cause of action, except as follows: Admit and allege that on or about June 11, 1953, defendant American Tobacco Company spon-

sored, defendant CBS produced, and defendant Jack Benny performed in a motion picture photoplay which was a burlesque of the motion picture photoplay entitled "Gaslight." Allege that these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations that Loew's, Inc., is the copyright proprietor of said motion picture photoplay entitled "Gaslight." Admit and allege that defendant CBS plans and intends to display and exhibit said burlesque over its television network facilities for the purposes, among others, of entertainment of the public and profit to itself and that defendant CBS will proceed to do so unless restrained by the above entitled court.

7. Deny each and every allegation contained in paragraph III of said cause of action, except as follows: Admit and allege that on or about June 9, 1953, plaintiff Loew's, Inc., addressed a telegram to defendants Jack Benny, CBS and American Tobacco Company, which read as follows: [38]

"We are advised that a repeat performance or remake by you of the television version of 'Gaslight' heretofore performed on the Jack Benny Show January 27, 1952, over the C.B.S. Television Network is now being contemplated. Notice is hereby given you that we consider the prior performance and any subsequent performances or remakes thereof to constitute infringements of our rights in and to 'Gaslight,' and that we intend to enforce such rights by all proper remedies afforded by law."

Third Count

8. Answering paragraph I of said cause of action, these answering defendants incorporate herein paragraphs 1, 2, 3, 4, 6 and 7 above, and each of them, as if fully set forth.

9. Allege that these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III of said count.

10. Deny each and every allegation contained in paragraph IV of said count.

As and for their Affirmative Defenses herein, these Answering Defendants allege:

First Defense

11. Burlesque is a form of literary art which is as old as literature itself and its traditions are unbroken over the centuries. It has always been accepted and sanctioned as an [39] established mode of literary criticism.

Burlesque, as a form of literature, characteristically takes serious elements from the subject of the burlesque and puts them into absurd or nonsensical form, using the comic tricks of exaggeration, inversion, inflation, deflation and transposition. It frequently uses the story or parts of the story of the work which is the subject of the burlesque and incidents and characters from such work, all of which it puts into absurd or nonsensical form. The new form created by a burlesque has been recognized throughout the history of literature, as a form

of literary art distinct and different from the literary work which is the subject of the burlesque.

Burlesque is a form of freedom of expression which flourishes in those societies where there is the most democratic liberty. There have been very few important plays, novels, verses or stories that have not been burlesqued at least once during their lifetime. Through the long millennia of western civilization the stage has always laughed at itself using burlesque as the vehicle for such laughter.

12. Burlesquing of motion pictures has, for many years, been an accepted custom in the broadcasting of entertainment over the air. Numerous entertainers, including Jack Benny, Fred Allen, Sid Caesar, Imogene Coca, Jimmie Gleason, Bob Hope and Henry Morgan, have merrily spoofed various motion pictures by presenting, over the air, burlesques of such pictures. Since 1932, Jack Benny programs have presented twenty-six burlesques of motion pictures distributed by plaintiff Loew's, Inc. and fifty-eight [40] burlesques of motion pictures distributed by one or the other of the following distributors of motion pictures: Universal, R.K.O., United Artists, Twentieth Century-Fox, Warner Bros., Columbia and Paramount.

Said programs were comedy programs which appealed to listening and viewing audiences throughout the United States because of humorous situations, dialogue and antics presented by defendant Benny and his supporting cast. Said programs ordinarily extended for one-half hour of broadcasting

time including commercials, monologue, repartee, *signing* and the burlesque.

13. On or about October 14, 1945, a Jack Benny program, sponsored by defendant American Tobacco Company, was presented over the national radio network of the National Broadcasting Company which included a burlesque of the M-G-M motion picture "Gaslight." On or about January 27, 1952, a Jack Benny program, produced by defendant CBS and sponsored by defendant American Tobacco Company, was presented over the national television network of defendant CBS which included, with modifications, said burlesque of the M-G-M motion picture "Gaslight." On or about June 11, 1953, defendant American Tobacco Company sponsored and defendant CBS produced a Jack Benny program in the form of a motion picture which was filmed for the purpose of using it as one of a planned series of Jack Benny programs to be broadcast over the national television network of defendant CBS between September, 1953, and June, 1954. Said Jack Benny program included, with further modifications, said October 14, 1945, burlesque of the M-G-M motion picture "Gaslight."

The burlesques of "Gaslight" contained in all of said programs were the original creations of writers skilled in the literary art of burlesque. The script of said October 14, 1945, program was prepared by writers then employed by defendant Benny. The scripts of said January 27, 1952, and June 11, 1953, programs were prepared by the same writers,

plus two additional writers on the June 11, 1953, script, all of whom were then employed by defendant CBS. Said scripts were written and performed in a manner which was highly original and unique and did not and will not detract in any way from the motion picture "Gaslight."

14. The use made by these answering defendants of the motion picture "Gaslight" was a fair use and not a copying of said motion picture in that said defendants used said motion picture only as the subject of an original and unique burlesque of said motion picture.

Second Defense

15. Plaintiffs are not entitled to maintain this suit or to assert infringement as alleged in the complaint by reason of laches in that defendant Benny first used the motion picture entitled "Gaslight" on October 14, 1945, as the subject of a burlesque and plaintiff Loew's cooperated with Benny in such use of said motion picture. Plaintiffs did not protest the use of the motion picture photoplay "Gaslight" as the subject of a burlesque for more than six years and, until the filing of this action, did not make any attempt to obtain a judicial determination of their alleged rights with respect to the burlesque by defendants of said motion picture. Defendants have relied upon such acquiescence and delay and have continued to use burlesques of said motion [42] picture and have invested large sums in reliance thereon. By reason thereof, plaintiffs are

estopped to assert that the burlesquing by these answering defendants of the motion picture "Gaslight" constitutes an infringement of plaintiffs' alleged copyrights.

Third Defense

16. The play and motion picture photoplay complained of in said complaint were burlesques of, and amounted to no more than fair use and fair criticism of, said motion picture photoplay of Loew's. No one viewing either the said play or the said photoplay complained of could reasonably believe he was viewing said photoplay of Loew's, or any part thereof; and the public showing of the said play and the said photoplay complained of did not, and will not, satisfy in whole or in part any demand that may have existed, or that may now or hereafter exist, for said photoplay of of Loew's.

Wherefore, said defendants pray that plaintiffs take nothing by their action and that said defendants may have their costs of suit.

Dated November 18, 1953.

O'MELVENY & MYERS,
/s/ By HOMER I. MITCHELL,
/s/ By ERNEST M. CLARK, JR.,
Attorneys for Defendants Columbia Broadcasting System, Inc., and American Tobacco Company.

Affidavit of Service by Mail attached. [44]

[Endorsed]: Filed November 19, 1953.

[Title of District Court and Cause.]

PRELIMINARY INJUNCTION

The plaintiff having moved for a preliminary injunction and there being no appearance in opposition thereto and findings being waived:

It Is Hereby Ordered, Adjudged and Decreed that:

1. Pending the trial and determination on the merits of the within action, or until further order of this Court, defendants, their officers, agents, representatives, licensees, employees and servants, and each of them, shall be and they are hereby restrained and enjoined from performing, publicly or privately (except as hereinafter in paragraph 4 hereof set forth), distributing, releasing, exhibiting or displaying that certain motion picture photoplay entitled "Gas Light," which motion picture photoplay was copyrighted by plaintiff Loew's Incorporated and which is more particularly described in paragraphs VI and VII of the complaint on file herein, or any colorable copy, imitation or simulation thereof; and from using [45] the title "Gas Light" or any colorable copy, imitation or simulation thereof, or of any of them.

2. Specifically, and without limiting the generality of the foregoing paragraph 1, defendants, their officers, agents, representatives, licensees, employees and servants, and each of them, are restrained and enjoined from committing any of the acts hereinabove specified in paragraph 1, with re-

spect to those certain Jack Benny photoplays specified in paragraph VIII of the first count and paragraph II of the second count of the complaint on file herein, except for the limited purposes set forth in paragraph 4 hereof.

3. The negative film or films of that certain Jack Benny photoplay referred to in paragraph II of the second count of the complaint on file herein, which photoplay was filmed on June 11, 1953, and all developed film negatives of said Jack Benny photoplay and all prints thereof, including but not limited to "daily" cutting prints, composite release prints and "fine grain" prints, all of which have heretofore been made pursuant to order of this Court, shall remain in the safekeeping and custody of Consolidated Film Industries at its Hollywood, California film vaults, except during such periods as they may be withdrawn for the limited purposes set forth in paragraph 4 hereof. No prints, negatives or negative films other than those heretofore or hereafter authorized by this Court shall be made until further order of this Court.

4. The prints hereinabove referred to in paragraph 2 hereof, or any of them, may be removed by the parties from the film vaults of Consolidated Film Industries, for the following purposes and for no others:

(a) To exhibit said prints to the parties, the attorneys for the parties, and to such other persons as the attorneys for the parties may mutually agree, at such times and places as the attorneys for the

[46] parties may mutually agree, in connection with the preparation of this action for trial;

(b) To exhibit said prints to the Court in connection with the trial of this action.

Upon completion of any exhibition as hereinabove specified, said prints shall be returned forthwith to the film vaults of Consolidated Film Industries for custody and safekeeping pursuant to the provisions of paragraphs 3 hereof.

5. Security in the amount of $1,000.00 heretofore deposited by plaintiffs pursuant to Rule 65(c) of the Federal Rules of Civil Procedure is deemed proper by this Court, and said security shall be deemed to apply as well to this Preliminary Injunction, and no further security shall be required.

Dated and Issued: November 23, 1953 at 1:50 p.m.

/s/ JAMES M. CARTER,
District Judge.

The foregoing Preliminary Injunction is hereby approved as to form.

Dated: November ...., 1953.

LOEB & LOEB,
HERMAN F. SELVIN,
ALLEN E. SUSMAN,
/s/ By HARRY L. GERSHON,

/s/ By HARY L. GERSHON,
Attorneys for Plaintiffs

O'MELVENY & MYERS,
HOMER I. MITCHELL,
ERNEST M. CLARK, JR.,
/s/ By HOMER I. MITCHELL,
Attorneys for Defendant Columbia Broadcasting System, Inc., Columbia Broadcasting System, Inc., of California and American Tobacco Company. [47]

WRIGHT, WRIGHT, GREEN & WRIGHT,
CHARLES A. LORING,
RICHARD M. GOLDWATER,
/s/ By CHARLES A. LORING,
Attorneys for Defendant Jack Benny [48]

[Endorsed]: Filed November 23, 1953.

[Title of District Court and Cause.]

STIPULATION OF FACTS AND ORDER THEREON

The parties hereto, through their respective counsel of record, hereby stipulate and agree, for the purposes of this action and for no other purpose, that the following facts may be deemed to be true:

1. The claims stated in the first and second counts of plaintiffs' complaint arise under the laws of the United States relating to and governing copyrights.

The claims stated in the third count of plaintiffs'

complaint arise under the laws of the State of California. Plaintiff Loew's Incorporated is a citizen of [49] the State of Delaware. Plaintiff Patrick Hamilton is a citizen of Great Britain. Defendant Columbia Broadcasting System, Inc. (hereinafter referred to as "CBS") is a citizen of the State of New York. Defendant American Tobacco Company (hereinafter referred to as "American") is a citizen of the State of New Jersey. Defendant Jack Benny is a citizen of the State of California. The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.

2. Plaintiff Loew's Incorporated (hereinafter referred to as "Loew's") was at the commencement of this action and now is a Delaware corporation, qualified to transact and transacting business in the State of California and within the Southern District thereof. Loew's is and for more than twenty-five years has been continuously engaged in the production and world-wide distribution of motion picture photoplays under its trade-name "Metro-Goldwyn-Mayer Pictures." Said pictures are commonly known to and recognized by the motion picture viewing public as "Metro-Goldwyn-Mayer" pictures or "M-G-M" pictures, and Loew's is commonly known to and recognized by the motion picture viewing public as "Metro-Goldwyn-Mayer" studio or "M-G-M" studio. The names "Metro-Goldwyn-Mayer" and "M-G-M" have acquired throughout the world a secondary meaning as denoting plaintiff corporation as a producer and distributor of motion pictures, and as denoting the

motion pictures produced and distributed by plaintiff. [50]

3. Defendant Columbia Broadcasting System, Inc., is a New York corporation, qualified to transact and transacting business in the State of California and within the Southern District thereof. Said corporation is and at all times material herein has been engaged in the business of broadcasting and telecasting radio and television programs, throughout the United States, and distributing and licensing others to broadcast and telecast transcriptions and recordings of radio and television programs.

4. Defendant American Tobacco Company (hereinafter referred to as "American") is a New Jersey corporation, qualified to transact and transacting business in the State of California and within the Southern District thereof. American is engaged, among other things, in the manufacture, distribution and sale of "Lucky Strike" cigarettes.

5. Prior to December 5, 1938, plaintiff Patrick Hamilton (hereinafter referred to as "Hamilton") created and wrote an original play or dramatic composition entitled "Gas Light." At all times during the making, creation, and writing of said play or dramatic composition, Hamilton was and now is a British subject and a citizen and resident of Great Britain. Said play or dramatic composition was first performed in public at the Richmond Theatre in Richmond, England, and was subsequently performed at the West End and Apollo theatres in London, England. [51]

At all times material herein the copyright of literary and dramatic works in Great Britain and all of its dominions and protectorates was and now is governed by the British Copyright Act of 1911. "Publication," for the purposes of that Act is defined as "the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work * * * " Under the provisions of said Act all unpublished works are fully protected by copyright if the author of the work "was at the time of the making of the work a British subject * * * " Copyright protection under said Act is secured to the copyright proprietor and his assigns during the life of the author and for fifty years immediately after his death. Hamilton is still alive.

Said play or dramatic composition was first published in the English language and copies thereof were first issued to the public in London, England, on February 17, 1939, by Constable & Company, Ltd. A copy of said play as first published shall be received in evidence as Exhibit 1. Under the provisions of the Copyright Act of 1911, all published works are fully protected by copyright in Great Britain if "the work was first published within such parts of His Majesty's dominions to which the act extends * * * " Said play or dramatic composition, and all copies thereof, including but not limited to, copies sold in the United States, were published with notice of copyright as set forth in said Exhibit 1.

Thereafter, and on November 18, 1941, plaintiff

Hamilton deposited in the United States Copyright Office [52] one complete copy of the edition published in England as aforesaid. The following is a copy of a Certificate of Copyright Registration issued by the Register of Copyrights with respect to said deposit:

"Additional Certificate (17 U.S.C. 215) Class D For. No. 78298.

Copyright Office of the United States of America.

The Library of Congress: Washington.

Certificate of Copyright Registration

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that of the Dramatic Composition named herein, by a citizen or subject of a foreign state or nation, One complete copy of the best edition, published in a foreign country, has been deposited in this Office under the provisions of the Act of 1909, as amended by the Act approved March 28, 1914, and that registration of a claim to copyright for the first term of twenty-eight years for said work has been duly made in the name of Patrick Hamilton, 21 Marlborough Rd., London N.W. 8, England. [53]

Title: Gas Light.

A Victorian thriller in three acts, by Patrick Hamilton, of Great Britain.

Date of publication Feb. 17, 1939. Copy received Nov. 18, 1941.

Published by Constable and Company Ltd. at London.

(Seal) ARTHUR FISHER,
Register of Copyrights".

On September 29, 1942, the play "Gas Light" was republished in the United States by Samuel French under the title "Angel Street" with the following notice of copyright:

"Copyright 1939, by Patrick Hamilton under the title, 'Gas Light.' Copyright 1942 (Acting Edition), by Patrick Hamilton."

Hamilton, in connection with said republication under the title "Angel Street," received from the Register of Copyrights a Certificate of Registration dated and certified as follows: "September 29, 1942, Class D, No. 82036."

The play was produced by Shepard Traube in association with Alexander H. Cohen, opening at the John Golden Theatre in New York on December 5, 1941. The play under the title "Angel Street," was thereafter licensed and performed in legitimate theatres, stock companies and community playhouses throughout the United States and Great Britain. [54].

By an agreement in writing dated October 7, 1942, Hamilton and his assignees sold, transferred and assigned to Loew's, among other things, all motion picture rights, in all languages, throughout the

world, without limit of time, in said play or dramatic composition entitled "Gas Light," including but not limited to silent, sound, talking and musical motion picture rights, and the right to televise and/or broadcast the motion pictures thus produced, as well as the right to remake said motion picture and to produce, distribute, exploit and publicize such remakes and/or any motion pictures based upon said play or dramatic composition or adapted therefrom.

6. Commencing December 1, 1942, and through May 5, 1944, Loew's created and produced an original motion picture photoplay entitled "Gaslight," featuring Charles Boyer, Ingrid Bergman and Joseph Cotten in the leading roles, based upon and adapted from said play or dramatic composition.

The purchase price paid by Loew's for the rights granted it in said play or dramatic composition, as set forth in paragraph 5 hereof, was $150,000. Commencing December 1, 1942, Loew's assigned certain screenwriters to the production of a screenplay for said motion picture photoplay, based upon said play or dramatic composition. Said screenwriters were employed by Loew's for that purpose and rendered their services in that connection for hire. Said screenwriters were: John Balderston, John van Druten, Estelle Newburgh and [55] Walter Reisch. Said writers worked a total of 77 weeks and 5 days in the production of said screenplay. The total cost to Loew's of the writing of said screenplay by the aforementioned writers was $126,691.98.

7. Said motion picture photoplay entitled "Gas-

light" was first published, with proper notice of copyright duly affixed in the name of Loew's, on May 5, 1944. Thereafter, with respect to said motion picture photoplay, Loew's received from the Registrar of Copyrights a Certificate of registration dated and certified as follows: "March 26, 1946, Class L, No. 170."

8. A true and correct copy of said motion picture photoplay entitled "Gaslight" shall be received in evidence as Exhibit 2 and will be exhibited to the above-entitled Court in connection with the trial of this action. The exhibition of said motion picture consumed approximately 1 hour and 40 minutes.

A true and correct copy of the dialogue cutting continuity script of said motion picture photoplay shall be received in evidence as Exhibit 3.

9. Since May 5, 1944, said motion picture photoplay has been exhibited by Loew's and by persons, firms and corporations licensed by it to exhibit said motion picture photoplay, in the following named countries and territories: [56]

Argentine, Australia, Belgium, Brazil, British West Indies, Canada, Chile, China, Colombia, Cuba.

Denmark, Ecuador, Egypt, Finland, Formosa, France, French Indo-China, Germany, Great Britain, Greece, Holland, Hong Kong, India, Italy.

Japan, Mexico, Netherlands East Indies, New Zealand, Norway, Palestine, Panama, Peru, Philippines, Portugal, Puerto Rico.

Siam, South Africa, Spain, Straits Settlements, Sweden, Switzerland, Syria.

United States, Uruguay, Venezuela, British West

Africa, Bermuda, Iceland, Turkey, Iran, Haiti.

Bahrein, Korea, Poland, Yugoslavia, Hungary, Czechoslovakia, Roumania, U.S. Army Installations here and abroad.

U.S. Navy ships afloat, and U.S. Naval Bases here and abroad.

Said motion picture photoplay was at all times distributed, exhibited, announced, advertised and exploited, and was at all times known to the motion picture [57] viewing public, as a "Metro-Goldwyn-Mayer" picture or "M-G-M" picture.

10. The total cost of production and distribution of said motion picture photoplay, the total gross rentals received by Loew's from the world-wide distribution and exhibition thereof, and the estimated total number of persons who paid admission fees or prices to see said motion picture photoplay, all through August 31, 1952, were as follows:

Total Production and Distribution Cost	$2,458,275.18
Total Gross Rentals:	
Domestic (U.S.A. and Canada)	$2,268,948.10
Foreign (all other countries)	2,588,111.82
Total	$4,857,059.92
Approximate Total Number of Paid Admissions:	
Domestic	24,786,000
Foreign	27,000,000
Total	51,786,000

11. The cost, receipt and attendance figures enumerated in paragraph 10, supra, are for the period of initial release and distribution of said motion picture photoplay. Said motion picture photoplay was withdrawn from domestic release and distribution on November 30, 1946, and has not yet been reissued. Said motion picture photoplay is still in distribution in the foreign market. [58]

It is a customary and usual practice in the motion picture industry to reissue for distribution and exhibition, five or more years after their initial release, motion pictures which have been highly successful in their initial release. Substantial rentals are often received from reissues of successful motion pictures.

12. At all times material hereto defendant Jack Benny (hereinafter referred to as "Benny") was and now is a radio and television comedian and entertainer and the leading performer on the radio and television programs commonly referred to as "Jack Benny Programs." Since on or about July 1, 1944, said programs have been sponsored by American and upon which programs "Lucky Strike" cigarettes are advertised. Prior to said date, the Jack Benny Programs were sponsored on the radio for various periods of time by various corporations advertising Canada Dry Ginger Ale, Chevrolet, General Tires, and Jello. Prior to January 2, 1949, said programs were broadcast over the network of National Broadcasting Company. Such programs are comedy programs which appeal to the listening and viewing audience because of the hum-

orous situations, dialogue and antics presented by Benny and his supporting cast. Each such program ordinarily extends for one-half hour broadcasting or television time. Benny is recognized as one of the most highly expert performers in many fields of comedy.

13. It has been Benny's custom to present from time to time on the Jack Benny programs over radio [59] and, on two occasions, on television, programs which include a play which Benny has usually described as "our version" of a specified motion picture. Benny has, since 1932, presented over radio plays on the following dates, which plays were usually described by him as "our version" of the following motion pictures produced and distributed by Loew's:

Name of Picture and Date of Broadcast

Grand Hotel: Oct. 10, 1932, Oct. 17, 1932, Dec. 1, 1932, Jan. 14, 1934, Nov. 25, 1934.

Strange Interlude: Dec. 18, 1932.

Dinner at Eight: Oct. 22, 1933, Jan. 21, 1934.

Romeo and Juliet: Nov. 12, 1933, Oct. 25, 1936, Nov. 1, 1936.

Barrett's of Wimpole Street: 1934.

Mutiny on the Bounty: Jan. 5, 1936.

Ah Wilderness: April 12, 1936, May 16, 1937.

Yellow Jack: Oct. 9, 1938.

Yank at Oxford: April 10, 1938.

Northwest Passage: May 19, 1940.

Gas Light: Oct. 14, 1945.

Week-End at the Waldorf: April 7, 1946.

Edward My Son: Sept. 18, 1949. [60]

King Solomon's Mines: Jan. 7, 1951, Jan. 14, 1951.
Dr. Jekyl and Mr. Hyde: Jan. 27, 1952.

Prior to April 5, 1938, Benny requested of Loew's that it permit him to broadcast "a so-called burlesque" of its photoplay "A Yank at Oxford." By written agreement between Loew's and Benny dated April 5, 1938, it was agreed that Loew's would give its permission therefor, upon condition that Benny submit the script thereof to Loew's for approval prior to broadcast and that, if Loew's did not give written approval thereof, the "burlesque" would not be broadcast.

Prior to April 6, 1946, Benny requested permission of Loew's for the appearance of Van Johnson, then under contract to Loew's, on his program of April 7, 1946, on which Benny presented a play described by him as "our version" of the Loew's photoplay "Week-End at the Waldorf." On April 6, 1946, by written agreement between Loew's and Benny, Loew's gave its permission for Van Johnson's appearance on Benny's program, upon condition that all material used in such program would be submitted to Loew's for advance approval and that, unless such material were first approved by Loew's in writing, Van Johnson would not be permitted to appear. Such material was in fact submitted and approved.

Prior to January 3, 1951, Benny informed Loew's that he desired to do a radio "version" of its photoplay "King Solomon's Mines" and requested that Loew's [61] loan him certain sound tracks from the photoplay for use in connection with his broadcast.

On January 3, 1951, Loew's furnished to Benny the requested sound tracks. Deborah Kerr, then under contract to Loew's, appeared on the Benny radio programs of January 7, 1951, and January 14, 1951, for the purpose of acting in the Benny "version" of "King Solomon's Mines," with the prior consent of Loew's.

Benny has presented over television plays on the following dates, which plays were described by him as "our version" of the following photoplays produced and distributed by Loew's:

Name of Picture and Date of Broadcast: Gaslight, January 22, 1952; Dr. Jekyl and Mr. Hyde, March 22, 1953.

Of the aforementioned motion pictures, the basic literary material of the following motion pictures was at the time of broadcast in the public domain: Romeo and Juliet, King Solomon's Mines, Dr. Jekyl and Mr. Hyde.

With respect to motion pictures produced or distributed by motion picture companies other than Loew's, Benny has, since 1932, presented over radio plays usually described by him as "our version" of such motion pictures, on the following dates: [62]

Name of picture, Distributor and Date of broadcast

All Quiet on the Western Front: Universal, May 19, 1933.

Little Women: R.K.O., Feb. 11, 1934.

House of Rothschild: United Artists, Aug. 24, 1934.

Rain: United Artists, 1934.

Flying Down to Rio: R.K.O., May 19, 1935.

Name of picture, Distributor and Date of broadcast

Les Miserables: July 7, 1935.

What Price Glory: 20th Century-Fox, Oct. 20, 1935.

Charlie Chan: 20th Century-Fox, Dec. 1, 1935.

Emperor Jones: United Artists, 1935.

Anthony Adverse: Warner Bros., Oct. 11, 1936, Oct. 18, 1936.

Lost Horizon: Columbia.

Submarine D-1: Warner Bros. Feb. 20, 1938, Feb. 27, 1938.

Tobacco Road: 20th Century-Fox, March 31, 1941.

Charlie's Aunt: 20th Century-Fox, May 19, 1941.

Algiers: United Artists, Oct. 23, 1938.

Snow White: R.K.O., April 24, 1938.

Tom Sawyer: Paramount, May 22, 1938, May 29, 1938, June 5, 1938.

Jesse James: 20th Century-Fox, Feb. 26, 1939, March 5, 1939.

Gunga Din: R.K.O., May 14, 1939, May 21, 1939.

Alexander Graham Bell: May 28, 1939.

Hound of the Baskervilles: 20th Century-Fox, June 4, 1939, June 11, 1939. [63]

Mr. Smith Goes to Washington: Columbia, March 10, 1940.

Hunchback of Notre Dame: R.K.O., March 17, 1940.

Pinocchio: R.K.O., March 31, 1940.

Casablanca: Warner Bros., Oct. 17, 1943.

Algiers: United Artists, Oct. 24, 1943.

State Fair: 20th Century-Fox, Jan. 13, 1946, Jan. 20, 1946.

Name of picture, Distributor, and Date of broadcast

Lost Week-End: Paramount, March 10, 1946.

The Killers: Universal, Nov. 24, 1946, Nov. 12, 1950.

Margie: 20th Century-Fox, Jan. 26, 1947.

Dark Passage: Warner Bros., Nov. 2, 1947.

Nightmare Alley: 20th Century-Fox, Feb. 8, 1948.

The Egg and I: Universal, May 23, 1948.

Sorry, Wrong Number: Paramount, Oct. 17, 1948.

Treasure of Sierra Madre: Warner Bros., May 1, 1949.

The Champion: United Artists, May 22, 1949, March 19, 1950.

Sunset Boulevard: Paramount, March 25, 1951.

Bend of the River: Universal, April 27, 1952.

Capt. Horatio Hornblower: Warner Bros., September 23, 1951.

Saturday's Hero: Nov. 18, 1951.

High Noon: United Artists, Sept. 28, 1952, Feb. 1, 1953. [64]

Road to Bali: Paramount, Jan. 11, 1953.

Snows of Kilimanjaro: 20th Century-Fox, March 8, 1953.

Mississippi Gambler: Universal, March 29, 1953.

Return to Paradise: United Artists, Sept. 20, 1953.

Wings of the Hawk: Universal, Oct. 18, 1953.

All American: Universal, Nov. 8, 1953.

With respect to motion pictures produced and distributed by Paramount, Benny's broadcasts of his "versions" of "Road to Bali" and "Lost Week-

End" were first suggested to him by the Paramount Publicity Department, and Bob Hope and Ray Milland, both then under contract to Paramount, appeared as guests on the programs, Hope on "Road to Bali" and Milland on "Lost Week-End."

Of the aforementioned motion pictures, the basic literary material of the following motion pictures was at the time of broadcast in the public domain: Little Women, Les Miserables, Charlie's Aunt, Snow White, Tom Sawyer, Gunga Din, Hound of the Baskervilles, Hunchback of Notre Dame, Pinocchio.

Exhibits 4a, 4b, 4c and 4d are typical examples of such plays presented on Jack Benny Programs and Exhibits 5a, 5b, 5c and 5d are the dialogue cutting continuity scripts of the motion pictures involved. Said exhibits may be offered in evidence subject to such objections as plaintiffs may make as to their relevance or materiality.

14. Since January 2, 1949, the Jack Benny Programs have been produced by CBS and have been broadcast and telecast throughout the United States over the radio stations and television channels owned and operated by or affiliated with CBS. CBS is a nationally known radio and television system or network.

15. On or about October 14, 1945, Benny caused to be written and produced a Jack Benny half-hour radio program, which included as a part thereof a playlet, of approximately 15 minutes in length, featuring Benny and Miss Ingrid Bergman in the leading roles. Miss Bergman played the leading role in the M-G-M motion picture "Gaslight." Loew's

did not have prior notice of nor did it consent to Miss Bergman's furnishing to Benny's writers her copy of the shooting script of the motion picture "Gaslight," as set forth in Paragraph 27, infra. Said radio program, including said playlet, was publicly performed at the U.S. Army Redistribution Center at Santa Barbara, California, on October 14, 1945, and said performance was broadcast on the radio on said date over the stations of the National Broadcasting Company being sponsored by American. Said radio program was transcribed on a phonograph record.

16. A true and correct record transcription of said radio program of October 14, 1945, shall be received in [66] evidence herein as Exhibit 6 and will be played for the above-entitled Court in connection with the trial of this action.

A true and correct copy of the script of said radio program of October 14, 1945, shall be received in evidence as Exhibit 7.

17. It is stipulated that, if called as a witness, Benny would testify as follows: That prior to said broadcast he advised Mr. Louis B. Mayer, then vice-president of Loew's Incorporated, that he intended to do what he then termed a "burlesque" of M-G-M's motion picture "Gas Light" and requested that Loew's send a print of the motion picture to the Redistribution Center so that it could be exhibited there during the week preceding the broadcast and thus enable the members of the Armed Forces at the Center, who would be his "studio audience," to be familiar with the motion

picture "Gas Light" so as better to enjoy and appreciate his "burlesque" thereof. In accordance with Benny's request, Loew's furnished a print of said motion picture to said Center.

18. On or about January 27, 1952, CBS caused to be written and produced a Jack Benny half-hour television program, presenting a play featuring Benny and Miss Barbara Stanwyck, a highly successful motion picture and theatre actress, in the leading roles. Said television program was publicly performed on television by CBS on January 27, 1952, being sponsored by American and being televised [67] over the channels and national television network of CBS as aforesaid. Said television program was reproduced on motion picture film and shortly after the broadcast of the television program on January 27, 1952, the motion picture film of said program was broadcast over those television stations affiliated with CBS which were unable to broadcast the live television program.

Benny received compensation from CBS for his services in connection with said program, and CBS received compensation from American for the production of said program and for the rental of the television time upon which said program was performed upon its channels and network.

19. A true and correct copy of said television program of January 27, 1952, reproduced on motion picture film, shall be received in evidence as Exhibit 8 and will be exhibited to the above-entitled Court in connection with the trial of this action. Said television program consumed 30 minutes, and

said play as a part of said program consumed approximately 15 minutes. A true and correct copy of the script of said television program of January 27, 1952, shall be received in evidence as Exhibit 9.

20. On January 30, 1952, Loew's addressed a letter to CBS reading as follows: [68]

"Columbia Broadcasting System
6121 Sunset Boulevard
Hollywood, California

Gentlemen:

This is to confirm the wire which we sent out to you today reading:

We Understand That on the Jack Benny Television Program of Sunday January 27, 1952, Substantial Portions of the Play 'Gaslight' by Patrick Hamilton Were Used. In All Fairness to You and in Order to Avoid Any Possible Future Unpleasantness We Would Like at This Time to Draw Your Attention to the Fact That by Various Mesne Agreements We Have Acquired From the Author Patrick Hamilton and Now Own Sole and Exclusive Rights to Produce and Record Said Play and Adaptations Thereof by Means of Cinematograph and Talking Films Sound Track Records Electrical and Mechanical Contrivances Broadcasting Television and Any Other Instruments Methods Devices and Means Whatsoever Now or Hereafter Known or Used for the Visual and/or Acoustic Production of the Same. Needless to Tell You That We Intend to and Shall Enforce Our Rights if They Be In-

fringed. We Would Appreciate Your Acknowledging Receipt of This Notice.

Very truly yours,

R. Monta, For Loew's Incorporated

RM:JM

Registered Mail No. 23246

Return Receipt Requested" [69]

The wire therein referred to was also sent. R. Monta was and is an employee of Loew's in charge of problems relating to literary, dramatic and musical properties.

On February 12, 1952, CBS addressed a letter to Loew's reading as follows:

"Loew's Incorporated
Culver City, California
Attention: Mr. R. Monta

Gentlemen:

This is to acknowledge receipt of your letter of January 30, 1952, confirming a wire sent to us by you with respect to use of the play 'Gaslight' upon the Jack Benny television program of Sunday, January 27, 1952.

Since it is our opinion that any reference to the play 'Gaslight' was well within the doctrine of 'fair use' which includes, as you know, the right to parody literary properties, we cannot agree with

any implication that such use infringed any rights of Patrick Hamilton or his assignees.

Very truly yours,

Richard W. Jencks
Assistant Resident Attorney

RWJ/hd"

Richard W. Jencks was then Assistant Resident Attorney and is now Resident Attorney of CBS at Los Angeles, [70] California.

Subsequent to the exchange of correspondence hereinabove set forth, Allen E. Susman, attorney for Loew's, and Gordon Hall, attorney for CBS, conferred with respect to the television program of January 27, 1952. Mr. Susman stated that it was Loew's position that said program constituted copyright infringement. Mr. Hall denied this, stating that same was authorized as "fair use." No resolution of these conflicting views was then had or attempted.

21. On or about May 28, 1953, CBS commenced the preparation of a motion picture, the script for which had theretofore been prepared, featuring Jack Benny and Miss Barbara Stanwyck. It was the intention of CBS to broadcast said motion picture over the television channels and network of CBS as one of five filmed Jack Benny television programs to be exhibited on television during the year commencing September 13, 1953.

22. On June 9, 1953, Loew's was for the first time informed that defendants intended to film said

motion picture as one of five filmed television shows to be exhibited on television during the year commencing September 13, 1953, as part of the "Jack Benny Television Program," to be presented and sponsored by American and to be exhibited over the television channels and network of CBS, and upon which Lucky Strike cigarettes were to be advertised. [71]

23. Under date of June 9, 1953, Loew's notified Benny, American and CBS as follows:

"We are advised that a repeat performance or remake by you of the television version of 'Gaslight' heretofore performed on the Jack Benny show of January 27, 1952, over the CBS television network is now being contemplated. Notice is hereby given you that we consider the prior performance and any subsequent performances or remakes thereof to constitute infringements of our rights in and to 'Gaslight,' and that we intend to enforce such rights by all proper remedies afforded by law."

24. On June 10, 1953, plaintiffs filed the above-entitled action and on the same date the above-entitled Court issued its temporary restraining order. On June 11, 1953, the above-entitled Court modified said temporary restraining order to permit the photographing upon motion picture film of said proposed television performance and said proposed television performance was in fact photographed on motion picture film subject to the order of the above-entitled Court dated June 11, 1953.

25. A true and correct copy of the motion picture film of said proposed television performance

shall be received in evidence herein as Exhibit 10 and will be exhibited to the above-entitled Court in connection with the trial of this action. The time consumed by said proposed television program is 30 minutes, and the time [72] consumed by said play as a part of said program is approximately 15 minutes.

A true and correct copy of the script of said television program of January 27, 1952, shall be received in evidence as Exhibit 11.

26. Defendants intend to and will, unless restrained therefrom by order of this Court, exhibit and cause to be exhibited said television program photographed on motion picture film on June 11, 1953, throughout the United States and over all of the television channels and network of CBS. Said exhibition will be conducted as in paragraph 22 specified.

27. The scripts of said Jack Benny radio programs marked Exhibits 7, 9 and 11 were written by Sam Perrin, George Balzer, John Tackaberry and Milton Josephsberg except that with respect to Exhibit 9 Alvin Gordon and Harold Goldman also rendered services in the writing of the script of said program. Prior to the preparation of Exhibit 7 in 1945, said Sam Perrin, George Balzer, John Tackaberry and Milton Josephsberg and Jack Benny viewed the motion picture "Gaslight," and prior thereto Sam Perrin and Milton Josephsberg saw the stage play "Angel Street." At the time of the preparation of said script said Sam Perrin, George Balzer, John Tackaberry and Milton Jo-

sephsberg had obtained and had available to them for reference a copy of the stage play "Angel Street" and had borrowed from Ingrid Bergmnn and had [73] available to them a copy of the shooting script of the motion picture "Gaslight." Thereafter, said writers did not see the motion picture "Gaslight" nor the stage play "Angel Street," nor the shooting script of the motion picture "Gaslight" but they continued to have available to them a copy of the stage play "Angel Street."

For their services in preparing Exhibit 7 (the 1945 script), said Sam Perrin, George Balzer, John Tackaberry and Milton Josephsberg were paid the sum of $3,000.

For their services in preparing Exhibit 9 (the 1952 script), said Sam Perrin, George Balzer, John Tackaberry, Milton Josephsberg, Alvin Gordon and Harold Goldman were paid $5,716.66. Perrin, Balzer, Tackaberry and Josephsberg were paid on a per job basis; Gordon and Goldman were paid a weekly salary.

With respect to the services of said Sam Perrin, George Balzer, John Tackaberry and Milton Josephsberg in the preparation of Exhibit 11 (the 1953 script), said writers were on weekly salaries in return for which they were obligated to produce thirty-nine radio programs and thirteen television programs. Of said salaries CBS charged against the preparation of Exhibit 11 the sum of $5,000.

Prior to June 10, 1953, CBS had paid or obligated itself to pay the sum of $54,167, which con-

stituted the [74] cost of production of Exhibits 10 and 11.

The parties hereto do not waive and hereby specifically reserve until the time of trial herein any and all objections which they may have to the relevance or materiality of any of the facts or testimony contained in this stipulation, as well as the right to introduce any additional evidence upon any of the issues herein.

Dated: December 31, 1953.

LOEB AND LOEB,
HERMAN F. SELVIN,
ALLEN E. SUSMAN,
HARRY L. GERSHON,
/s/ By HARRY L. GERSHON,
Attorneys for Plaintiffs.

O'MELVENY & MYERS,
HOMER I. MITCHELL,
ERNEST M. CLARK, JR.,
/s/ By HOMER I. MITCHELL,
Attorneys for Columbia Broadcasting System, Inc., Columbia Broadcasting System, Inc. of California and American Tobacco Company.

WRIGHT, WRIGHT, GREEN & WRIGHT,
CHARLES A. LORING,
RICHARD M. GOLDWATER,
/s/ By CHARLES A. LORING,
Attorneys for Defendant Jack Benny

Upon the foregoing stipulation, It Is So Ordered this 5th day of January 1954.

/s/ JAMES M. CARTER,
Judge [75]

[Endorsed]: Filed January 5, 1954.

[Title of District Court and Cause.]

STIPULATION AS TO THE APPROXIMATE SIZE OF THE AUDIENCE FOR JACK BENNY TELEVISION PROGRAMS

It Is Hereby Stipulated by and between plaintiffs and defendants that, based upon a survey made by Nielsen National Television Index of the number of homes reached by the Jack Benny television programs for the current season, and based upon a survey made by the AMN Research Bureau showing that the average number of viewers for television broadcasts generally is 3.1 viewers per set, the Jack Benny television programs on the dates hereinafter specified reached approximately the number of homes hereinafter specified and were viewed by approximately the number of viewers hereinafter specified: [76]

Broadcast date: September 13, 1953; homes reached: 8,199,000; viewers reached: 25,417,000.

Broadcast date: October 4, 1953; homes reached: 6,073,000; viewers reached: 18,826,000.

Broadcast: October 25, 1953; homes reached: 7,863,000; viewers reached: 24,375,000.

Broadcast date: November 15, 1953; homes reached: 8,882,000; viewers reached: 27,534,000.

Broadcast date: December 6, 1953; homes reached: 8,419,000; viewers reached: 26,099,000.

Dated: January 20, 1954.

LOEB & LOEB,
/s/ By ROGER H. DAVIS,
Attorneys for Plaintiffs

WRIGHT, WRIGHT, GREEN & WRIGHT,
/s/ By RICHARD M. GOLDWATER,
Attorneys for Defendant Jack Benny

O'MELVENY & MYERS,
/s/ By HOMER I. MITCHELL,
Attorneys for Defendant Columbia Broadcasting System, Inc. and American Tobacco Company.

It Is So Ordered this 21st day of January, 1954.

/s/ JAMES M. CARTER,
Judge [77]

[Exhibit No. 15, admitted in evidence 1/21/54.]

[Endorsed]: Filed January 21, 1954.

[Title of District Court and Cause.]

STIPULATION RE INTRODUCTION INTO EVIDENCE OF DRAMA "ARIZONA" AND BURLESQUE THEREOF

Whereas, at the trial of the herein action Dr. Frank C. Baxter testified as follows: "In the history of the New York stage we see burlesques given in the first part of this century of Arizona, Barbara Frietchie, Bohemian Girl, Camille." (Reporter's Transcript page 50); and

Whereas, counsel for defendants have only recently discovered that there is on file in the New York Public Library copies of several burlesques presented on the New York stage in the first part of this century, among such being the burlesque of "Arizona" referred to by Dr. Frank C. Baxter;

Now, Therefore, it is hereby stipulated by the parties hereto by and through their respective attorneys as follows:

1. The trial of the herein action may be and hereby is reopened for the purpose of introducing the following evidence [78] which may be and hereby is admitted into evidence as a part of defendants' case, subject to the objections heretofore made by plaintiffs to Dr. Baxter's testimony herein and to the introduction in evidence of Exhibits 4A through D, 5A through D, 12 and 13, and paragraph 13 of the Stipulation of Facts, which objections shall be deemed to have been made to the introduction in evidence of the exhibits hereinafter referred to:

A. A copy of the book "Arizona", a drama in

four acts written by Augustus Thomas, which will be marked Exhibit 16.

B. A copy of a burlesque written by Edgar Smith of said "Arizona", which will be marked Exhibit 17.

2. Said drama "Arizona" was first presented in New York on September 10, 1900, in the Herald Square Theatre at Broadway and 35th Street. It played for a total of 140 performances.

3. Said burlesque of "Arizona" was first presented in New York on October 18, 1900, in the Weber and Fields Broadway Music Hall between Broadway and Sixth Avenue.

O'MELVENY & MYERS,
/s/ HOMER I. MITCHELL,
Attorneys for Columbia Broadcasting System, Inc., and American Tobacco Company

WRIGHT, WRIGHT, GREEN & WRIGHT,
/s/ By CHARLES A. LORING,
Attorneys for Jack Benny

LOEB & LOEB,
/s/ By HARRY L. GERSHON,
Attorneys for Plaintiffs

It Is So Ordered this 16th day of February, 1954, and cause re-submitted this date.

/s/ JAMES M. CARTER,
Judge [79]

[Endorsed]: Filed February 16, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly to be heard on January 5, 1954, before the Honorable James M. Carter, District Judge, sitting without a jury, a jury having been expressly waived by the parties. Plaintiffs appeared by their attorneys Messrs. Loeb and Loeb, by Herman F. Selvin, Allen E. Susman and Harry L. Gershon; defendants Columbia Broadcasting System, Inc., Columbia Broadcasting System, Inc., of California, and American Tobacco Company, appeared by their attorneys Messrs. O'Melveny & Myers, by Homer I. Mitchell, W. B. Carman, and Ernest M. Clark, Jr.; and defendant Jack Benny by his attorneys, [80] Messrs. Wright, Wright, Green & Wright by Richard M. Goldwater. The cause was dismissed as to defendant Columbia Broadcasting System, Inc. of California and all fictitiously named defendants. Evidence both oral and documentary was received in behalf of the respective parties, and the cause having been duly argued and submitted to the Court for decision, and the Court having duly considered the same, now makes its Findings of Fact and Conclusions of Law herein as follows:

Findings of Fact

I.

This cause, as to the claims stated in the first and second counts of the complaint herein, arises under the Copyright Laws of the United States and is,

therefore, a case of which this Court has jurisdiction under and by virtue of the provisions of Title 28, section 1338(a) of the United States Code. With respect to the claim stated in the third count of the complaint the cause is one in which such claim has been joined with a substantial and related claim under the copyright laws, and is also one wholly between citizens of different states in which the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00; and is, therefore, a case of which this Court has jurisdiction under and by virtue of the provisions of Title 28, sections 1338(b) and 1332 of the United States Code.

II.

At all times material herein: plaintiff Loew's Incorporated (hereinafter for convenience referred to as "Loew's") has been and is now a corporation duly organized and existing under and by virtue of the laws of, and so was and is a citizen of, the state of Delaware, duly qualified to transact and transacting business in the state of California and within the Southern Federal Judicial District of California; [81] plaintiff Patrick Hamilton (hereinafter for convenience referred to as "Hamilton") has been and is now a citizen and resident of Great Britain; defendant Columbia Broadcasting System, Inc. (hereinafter for convenience referred to as "CBS") has been and is a corporation duly organized and existing under and by virtue of the laws of, and so was and is a citizen of, the state of New York, duly qualified to transact and transacting

business in the state of California and within said Southern District of California; defendant Columbia Broadcasting System, Inc. of California has been and is a corporation duly organized and existing under and by virtue of the laws of, and so was and is a citizen of, the state of California, transacting business within said Southern District of California; defendant American Tobacco Company (hereinafter for convenience referred to as "American") has been and is a corporation duly organized and existing under and by virtue of, and so was and is a citizen of, the state of New Jersey, qualified to transact and transacting business in the state of California and within said Southern District of California; defendant Jack Benny (hereinafter for convenience referred to as "Benny") was and is a citizen of the state of California.

III.

Prior to December 5, 1938 Hamilton created and wrote in Great Britain an original play or dramatic composition entitled "Gas Light." Copyright of said play or dramatic composition was duly and regularly secured by Hamilton in Great Britain under and pursuant to the laws of that country. Thereafter, on November 18, 1941, Hamilton complied in all respects with the copyright laws of the United States and all other laws thereof governing copyright and secured the exclusive rights and privileges in and to said play or dramatic composition in the United States and received from the

Register of Copyrights a certificate of copyright therein and thereto. [82]

IV.

On or about October 7, 1942, Hamilton and his assignees sold, transferred and assigned to Loew's all motion picture rights, in all languages throughout the world and without limitation of time, in said play or dramatic composition "Gas Light," and Loew's ever since has been and is now the owner of said rights.

V.

Subsequent to October 7, 1942, and prior to May 5, 1944, Loew's created and produced an original motion picture photoplay entitled "Gas Light," based upon and adapted from said play or dramatic composition. Beginning on May 5, 1944, said motion picture photoplay has been exhibited by Loew's, and by persons, firms and corporations licensed by it to exhibit said motion picture photoplay, throughout the United States and in many parts of the world. Said motion picture photoplay is still in distribution in the foreign market.

VI.

On or about May 5, 1944, Loew's complied in all respects with the copyright laws of the United States and all other laws thereof governing copyright and secured the exclusive rights and privileges in and to said motion picture photoplay, and received from the Register of Copyrights a certifi-

cate of registration therein and thereto. At all times since Loew's has been and is now the proprietor of all rights, title and interest in and to said motion picture photoplay and the copyright thereof.

VII.

On or about October 14, 1945, Benny caused to be written and produced, by writers and other persons in his employ and under his direction and control, a radio play. Said play featured Benny in one of the principal roles and was based upon and adapted and copied in substantial part from the motion picture photoplay hereinabove [83] in Findings V and VI referred to. Said play was publicly performed over radio as part of one half-hour program starring Benny and sponsored by and advertising the products of American. Said performance was done with the permission of Loew's but said permission did not extend beyond that specific performance.

VIII.

On or about January 27, 1952, CBS caused to be written and produced, by writers and other persons in its employ and under its direction and control (some of which writers were the same writers hereinabove in Finding VII referred to) and with the knowledge and consent of Benny, a television program starring Benny and sponsored by and advertising the products of American. Included in said television program was a play entitled "Gas Light" which was copied by said writers and producers, in substantial part from the motion picture photoplay

hereinabove in Findings V and VI referred to, without the knowledge, consent, permission or license of plaintiffs, or either of them. The part so copied was and is a substantial part of said play and of the copyrightable and copyrighted material in said motion picture photoplay. Said television program, including said play, was publicly performed and exhibited on television for profit by CBS over its channels and national network throughout the United States. Said program was *conspored* by and advertised the products of American. Said program, including said play, was reproduced on motion picture film and by means thereof was, subsequent to January 27, 1952, publicly performed and exhibited on television for profit by various television stations throughout the United States affiliated with CBS which were unable to televise or broadcast it at the time of its first public performance or exhibition. Said motion picture film is still in existence and in the possession and under the control of the defendants, or some of them. By means of said film defendants are and will continue to be enabled, at such time or times as they see fit, to publicly perform and exhibit or to [84] cause or permit others to publicly perform or exhibit said play reproduced thereon, on television, in motion picture theatres and in any other places or before any audiences in and before which motion pictures may or can be projected and exhibited; but defendants have not threatened and do not intend to perform or exhibit said play hereafter, except to the extent and in the

manner hereinafter in Findings X and XI found. Benny received compensation from CBS for his services in connection with said program and play, and CBS received compensation from American for the production of said program and play and for the rental of the television time upon which said program, including said play, was performed and exhibited upon its channels and network.

IX.

On or about January 30, 1952, Loew's notified CBS that it considered the copying of its motion picture photoplay "Gas Light" and the performance or exhibition of the play "Gas Light" included in said television program to be an infringement of its rights.

X.

On or about May 28, 1953, CBS commenced the preparation of a motion picture, the script for which had theretofore been prepared. Said motion picture was entitled "Auto Light" and was designed and intended to be a remake of the play included in the television program hereinabove in Finding VIII referred to, to be publicly exhibited on television throughout the United States as part of one of five filmed television programs starring Benny, sponsored by, and advertising the products of American, and to be presented, distributed and exhibited by CBS over its channels, national network and affiliated television stations during the year commencing September 13, 1953. Loew's first learned of these facts on June 9, 1953; and immedi-

ately thereafter on said date notified Benny, American and CBS that any repeat performance of or remake of the play hereinabove in Finding [85] VIII referred to would be an infringement of Loew's rights. On June 10, 1953, the within action was commenced and a temporary restraining order was issued, to which order reference is hereby made. On June 11, 1953, said restraining order was modified by an order made pursuant to stipulation of the parties, to which order of modification reference is hereby made, to permit the filming of said proposed motion picture and the development of the negative film thereof, but otherwise maintaining in force the temporary restraining order theretofore issued. Thereafter said restraining order was from time to time modified so as to permit the making of positive prints of said motion picture but otherwise maintaining said restraining order in force; and on November 23, 1953, the within Court issued a preliminary injunction enjoining the defendants, among other things, from performing, distributing, releasing, exhibiting or displaying the said motion picture or the motion picture film hereinabove in Finding VIII referred to.

XI.

It was the intention of defendants to publicly perform and exhibit for profit, and but for said restraining order and preliminary injunction they would have publicly performed and exhibited for profit, the motion picture hereinabove in Finding X referred to, in substantially the same manner, by

the same means and to the same extent as the play and motion picture film hereinabove in Finding VIII referred to were publicly performed and exhibited. Unless defendants continue so to be enjoined and restrained they will so publicly perform and exhibit the motion picture hereinabove in Finding X referred to.

XII.

The motion picture hereinabove in Finding X referred to was copied by CBS in substantial part from the motion picture photoplay "Gas Light" hereinabove in Findings V and VI referred to, [86] without the consent, permission or license of plaintiffs or either of them. The part so copied was and is a substantial part of said play and of the copyrightable and copyrighted material in said motion picture photoplay.

XIII.

The plaintiffs have expressly waived, during the pendency of this action, any right they might have had to recover damages or to have an accounting of profits on account of the matters hereinabove found and have agreed to be limited to injunctive relief; and accordingly, the Court finds, solely because of said waiver, that plaintiffs are not entitled to recover damages or have an accounting of defendants' profits.

XIV.

Plaintiffs have not, nor has either of them, delayed unreasonably in the enforcement of their rights or in the commencement of this action. They have not, nor has either of them, been guilty of

laches; and they are not, nor is either of them, estopped from now asserting or enforcing their rights against defendants, and any or either of them. Plaintiffs acted promptly to assert and notify defendants of their rights upon first learning of the facts hereinabove in Finding VIII found; and acted promptly to enforce those rights upon first learning of defendants' intention again to infringe those rights as hereinabove in Finding X found.

XV.

The copying and use by defendants of the copyrighted material of plaintiffs, as above found, was not and is not a fair use of such material; nor was or is such copying or use made fair by reason of the fact that said material was used by defendants by way of burlesque or parody. [87]

XVI.

With respect to the claim of unfair competition alleged in count three of the complaint herein, the Court finds that the facts alleged in paragraphs II and III of said count are true but that plaintiffs have failed otherwise to sustain the burden of proof imposed upon them in respect of said claim.

Conclusions of Law

1. Loew's is the owner and proprietor of all rights, title and interest in and to the motion picture photoplay "Gas Light" and in and to the copyright thereof.

2. Defendants' copying and use of a substantial

part of the copyrightable and copyrighted material in said motion picture photoplay, as heretofore found, was and is an infringement of said rights, title and interest and of said copyright; and the future or repeated performance or exhibition of the play or motion picture hereinabove in Findings VIII and X referred to, by defendants, or any or either of them, will also be such an infringement.

3. Plaintiffs are entitled to judgment enjoining and restraining defendants; and their or any of their officers, agents, representatives, employees or servants, during the continuance of the copyright hereinabove in Finding VI referred to, or any renewal, renewals, extension or extensions thereof, from using, displaying, performing, exhibiting or in any way copying or reproducing, or causing or permitting anyone else to use, display, perform, exhibit or in any way copy or reproduce, the play or motion picture hereinabove in Finding X referred to, and ordering said defendants to excise and delete from all negatives, positive prints and any other reproductions or recordations of the filmed television program hereinabove in Finding X referred to and of the television program [88] hereinabove in Finding VIII referred to, all uses, reproductions, copies, and recordations of and references to, the play or motion picture hereinabove in Findings VIII and X referred to, and further ordering said defendants to deliver to the Clerk of this Court for destruction as by law provided, all such excised or deleted parts.

4. Plaintiffs are further entitled to judgment for

their taxable costs incurred herein (but not including any attorneys' fee) and to have execution for such costs.

5. The Court is not ordering the issuance at this time of an injunction against use of the television play, and the motion picture film reproducing said play, referred to in Finding VIII, but only because defendants have not threatened or manifested any intention to make any use thereof hereafter. The Court will retain and reserve jurisdiction for the purpose of issuing any injunction which may hereafter be necessary, expedient or proper in protection of plaintiffs' rights with respect to said television play and the motion picture film reproducing said play referred to in Finding VIII hereof.

6. Count three of the complaint herein should be dismissed.

Let Judgment be entered accordingly.

Dated: May 20, 1955.

/s/ JAMES M. CARTER,
District Judge

Approved (Disapproved) as to form as required by Local Rule 7.

WRIGHT, WRIGHT, GREEN & WRIGHT,
RICHARD M. GOLDWATER,
/s/ By CHARLES A. LORING,
Attorneys for defendant Benny [89]

[Endorsed]: Lodged May 17, 1955. Filed May 20, 1955.

In the United States District Court, Southern District of California, Central Division

Civil No. 15602-C

LOEW'S INCORPORATED, a corporation and PATRICK HAMILTON, Plaintiffs,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., et al., Defendants.

JUDGMENT

(For Injunctive and Other Relief Against Infringement by Columbia Broadcasting System, Inc., American Tobacco Company and Jack Benny of Copyright in Motion Picture "Gas Light")

The within cause having been duly tried before the Court, sitting without a jury, and the Court having made and filed its findings of fact and conclusions of law herein, and good cause therefor appearing; Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed as follows:

(1) Defendants Columbia Broadcasting System, Inc., American Tobacco Company, and Jack Benny, and their respective officers, agents, representatives, employees and servants are, and each of them is, enjoined and restrained during and throughout the continuance of [90] the copyright on the motion picture photoplay "Gas Light", of which Loew's Incorporated is the proprietor, and during and throughout any renewal, renewals, extension or ex-

tensions of said copyright, from using, displaying, performing, exhibiting or in any way copying or reproducing, or causing or permitting anyone else to use, display, perform, exhibit or in any way copy or reproduce the whole or any part or portion of that certain filmed television play entitled "Auto Light", starring Jack Benny, the preparation of which was commenced by defendants above named, or one or more of them, on or about May 28, 1953, and which was photographed on film on or about June 11, 1953, which is the same filmed television play which this Court has found to be an infringement of the copyrighted motion picture photoplay "Gas Light."

(2) Defendants Columbia Broadcasting System, Inc., American Tobacco Company and Jack Benny are, and each of them is, ordered to excise and delete within 60 days after this Judgment shall have become final, from all negatives, positive prints and all and any other reproductions and recordations of the filmed television programs starring Jack Benny, one of which was caused to be written and produced by defendants above-named, or one or more of them, on or about January 27, 1952 and the other of which was filmed by said defendants, or one or more of them, on or about June 11, 1953, all uses, reproductions, copies and recordations of and references to the play or motion picture variously entitled "Gas Light" or "Auto Light" included as part of said filmed television programs, and which is the same play and motion picture which this Court has found to be an infringement of the copy-

righted motion picture photoplay "Gas Light."

(3) Defendants Columbia Broadcasting System, Inc., American Tobacco Company and Jack Benny are ordered to deliver within 60 days after this Judgment shall have become final to the Clerk of this Court for destruction as by law provided, all such excised and deleted parts, as provided in Paragraph 2 [91] of this Judgment.

(4) Count three of the complaint herein is dismissed.

(5) The Court reserves and retains jurisdiction of this cause for the purpose of issuing any injunction which may hereafter be necessary, expedient or proper in protection of the rights of Loew's Incorporated as proprietor of all rights, title and interest in and to its motion picture "Gas Light", and as proprietor of the copyright thereof, with respect to the television play, entitled "Gas Light", produced by said defendants, or one or more of them, on or about January 27, 1952, and its reproduction on film, which are the same television play and film which this Court has found to be an infringement of the copyrighted motion picture photoplay, "Gas Light."

(6) Plaintiffs shall have and recover their costs incurred herein (but not including attorneys' fees), which costs are hereby taxed in the sum of $200.95, and the plaintiffs shall have execution thereon.

(7) The action is dismissed as to Columbia Broadcasting System, Inc. of California and as to all fictitious defendants.

The Clerk is ordered to enter this judgment forthwith.

Dated: May 20, 1955.

/s/ JAMES M. CARTER,
Judge [92]

[Endorsed]: Lodged May 17, 1955. Filed May 20, 1955. Entered May 23, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Jack Benny, a defendant in the above entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on the 23rd day of May, 1955.

Dated: June 17th, 1955.

LOYD WRIGHT,
RICHARD M. GOLDWATER,
CHARLES A. LORING,
WRIGHT, WRIGHT, GREEN & WRIGHT.

/s/ By CHARLES A. LORING,

Attorneys for Defendant and Appellant, Jack Benny [93]

Affidavit of Service by Mail attached. [94]

[Endorsed]: Filed June 17, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendants Columbia Broadcasting System, Inc., and American Tobacco Company, and each of them, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 23, 1955.

O'MELVENY & MYERS,
s/ By ERNEST M. CLARK, JR.,
Attorneys for Defendants Columbia Broadcasting System, Inc., and American Tobacco Company. [95]

Affidavit of Service by Mail attached. [96]

[Endorsed]: Filed June 21, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE AND DOCKET THE RECORD ON APPEAL

Whereas, the clerk of the above-entitled court desires additional time to prepare the record on appeal in the above-entitled case,

It Is Hereby Ordered that the time for filing and docketing the record on appeal in said case is extended, as permitted by Rule 73(g) of the Federal Rules of Civil Procedure, to and including September 16, 1955, which said date is ninety days from

the date of filing the first notice of appeal in said case.

Dated: July 21, 1955.

/s/ JAMES M. CARTER,
District Judge [100]

[Endorsed]: Filed July 21, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING AND DOCKETING APPEAL

Good cause appearing therefore,

It is Ordered that the time within which the Clerk may file and docket the record on Appeal in the above entitled matter be and the same is hereby extended to and including September 15, 1955.

Dated: July 23, 1955.

/s/ JAMES M. CARTER,
Judge of the U. S. District Court

[Endorsed]: Filed July 22, 1955.

[Title of District Court and Cause.]

STIPULATION THAT EXHIBITS MAY BE CONSIDERED IN THEIR ORIGINAL FORM

It Is Hereby Stipulated by and between the parties hereto through their respective counsel

that the Exhibits in the above entitled matter may be considered by the Court of Appeal in their original form without the necessity of reproduction in the record; said Exhibits consist of Books, Motion Picture Manuscripts, Positive Prints of Motion Pictures, Transcriptions of Radio Programs, Positive Prints of Television Programs and similar material which would be costly to print or reproduce in other form and which can be best observed in their original form.

Dated: October 27, 1955.

LOEB & LOEB, and
HERMAN F. SELVIN,
s/ By HERMAN F. SELVIN,
Attorneys for Plaintiffs and Respondents, Loew's Inc. and Patrick Hamilton.

O'MELVENY & MYERS,
HOMER MITCHELL,
ERNEST CLARK,
s/ By W. B. CARMAN,
Attorneys for Defendants Appellants, Columbia Broadcasting System, Inc. and American Tobacco Company

WRIGHT, WRIGHT, GREEN & WRIGHT,
LOYD WRIGHT,
RICHARD M. GOLDWATER,
s/ By D. K. WRIGHT,
Attorneys for Defendant Appellant, Jack Benny

[Endorsed]: Filed October 28, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 107, inclusive, contain the original

Complaint;

Order to Show Cause and Temporary Restraining Order;

Affidavit of Rudolf Monta;

Memorandum of Points and Authorities;

Order Modifying Temporary Restraining Order;

Answer of Jack Benny;

Answer of CBS, Inc. and American Tobacco Co.;

Preliminary Injunction;

Stipulation of Fact and Order Thereon;

Stipulation as to the Approximate Size of the Audience for Jack Benny Television programs; (which is also exhibit (deft) fifteen (15);

Stipulation re. Introduction into evidence of drama "Arizona" and Burlesque thereof;

Findings of Fact and Conclusions of Law;

Judgment;

Notice of Appeal (Jack Benny);

Notice of Appeal (CBS);

Designation of Contents of Record (CBS);

Order Extending Time to Docket Record (CBS);

Designation of Contents of Record (Jack Benny);

Order Extending Time to Docket Record (Jack Benny);

which, together with the original plaintiffs' exhibits 1, 3, 4A, B, C, D, 5A, B, C, D, 7, 9, 11, 12, 13, 15 (which is Stipulation as to approximate size of Jack Benny TV Audience and part of transcript) 16 and 17; and one volume of Reporter's Transcript of Proceedings, all in the above entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record (as to both Notices of Appeal) amount to $4.00, which sum has been paid by appellants.

Witness my hand and the seal of said District Court, this 28th day of October, 1955.

[Seal] s/ EDMUND L. SMITH,
Clerk

s/ By CHARLES E. JONES,
Deputy

In the United States District Court, Southern District of California, Central Division

No. 15602-C—Civil

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON, Plaintiffs,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., et al., Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Tuesday, Jan. 5, 1954

Honorable James M. Carter, Judge presiding.

Appearances: For the Plaintiffs: Loeb & Loeb by Herman Selvin and Harry L. Gershon. For the Defendants Columbia Broadcasting System, Inc., and American Tobacco Co.: O'Melveny & Myers by Homer I. Mitchell and Ernest M. Clark, Jr. For the Defendant Jack Benny: Wright, Wright, Green & Wright By Charles A. Loring and Richard M. Goldwater. [1*]

(Other court matters.)

The Clerk: No. 15602-C Civil, Loew's Incorporated, and others, vs. Columbia Broadcasting System, Inc., Columbia Broadcasting System, Inc. of California, and American Tobacco Company, and Jack Benny, for trial.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Mr. Selvin: Ready for plaintiffs.

Mr. Mitchell: Ready for the defendant Columbia Broadcasting System, Inc. and American Tobacco Company.

Mr. Goldwater: Ready for the defendant Jack Benny.

The Court: All right. Proceed.

Mr. Selvin: At this time I think the cause should be dismissed as to fictitiously named defendants, and also Columbia Broadcasting System, Inc. of California.

My request in that regard being based on Mr. Mitchell's assurance that that concern had nothing whatever to do with the transactions complained of here.

The Court: The motion will be granted.

Mr. Selvin: The parties have agreed on a stipulation of facts, an original and copy of which I would now like to hand to your Honor, and it provides for approval by your Honor.

You will note in addition to providing for the admission subject to the objections of the parties of certain exhibits, it reserves to the parties objections to any of the [2] facts stipulated to and reserves to them the right to produce additional evidence.

Unless your Honor desires some other form of procedure I should like at this time to offer up the various exhibits identified in the stipulation in order that they may be received and marked, except certain ones as to which we have objections.

The Court: I was just checking. Your pretrial

stipulation doesn't list the issues of law and fact to be decided but I take it they are relatively simple.

Mr. Selvin: That is true. That stipulation was not intended strictly as a pretrial stipulation, but as a stipulation of at least the principal facts.

I might point out, your Honor in connection with the reservation contained in the stipulation, at the appropriate time, which I assume will be when the defendants put on their case, I intend to interpose objections to certain portions of the stipulation, principally paragraph 13 thereof, but I think that can be deferred until the defendants' case, particularly since I know Mr. Mitchell is very anxious to have his witness Dr. Baxter finish before 3:30 this afternoon. So we can defer that until after Dr. Baxter has testified.

The Court: You may.

Mr. Selvin: I shall offer, first, as the exhibit referred to as Exhibit 1 in the stipulation a copy of the plaintiff [3] Patrick Hamilton's play Gas Light as published and registered for copyright.

The Court: Received as Exhibit 1, in evidence.

What pages are these exhibits listed on?

Mr. Selvin: That is listed on page 8.

Mr. Mitchell: Page 4.

Mr. Selvin: That is right, page 4, line 21.

(The document referred to was marked Exhibit 1, and was received in evidence.)

Mr. Selvin: The exhibit referred to as 2 is the motion picture of the plaintiff Loew's entitled Gas Light, and I understand there that we are agreed

that instead of bringing the inflammable prints into court, since your Honor has already seen an exhibition of the picture, that they may be given that number in absentia and deemed in evidence for all purposes in this cause.

Mr. Mitchell: So stipulated.

The Clerk: What is that,—a positive print?

Mr. Selvin: Positive print. And it may be retained in the possession of the plaintiff subject to production whenever required in the case.

Mr. Mitchell: Yes.

The Clerk: That would be a positive print of the motion picture,—what is the title, Gas Light?

Mr. Selvin: Yes. [4]

The Court: And will be produced for exhibition to the Circuit?

Mr. Selvin: In this or any other court to which the matter may go.

The Court: Did you say "may go"? All right. That stipulation is approved and the positive print in absentia will be received as Exhibit 2 in evidence.

(The print referred to was received in evidence as Exhibit 2.)

Mr. Selvin: Exhibit 3, which is referred to at page 8, line 20, of the stipulation, is a copy of the so-called cutting continuity of the motion picture Exhibit 2. A copy of that is already in the files of this court in connection with the proceedings on the application for temporary restraining order, and may be marked Exhibit 3 by reference.

The Court: It may be marked Exhibit 3 and received in evidence.

(The cutting continuity referred to was marked Exhibit 3 and was received in evidence.)

Mr. Selvin: I think it is attached to the affidavit of Rudolf Monta.

The Court: That is the cutting continuity of the play Gas Light, is that right?

Mr. Selvin: Yes, your Honor.

The Clerk: The document in the file which bears a filing [5] date of June 10, 1953, according to counsel——

Mr. Mitchell: That is the cutting continuity of the motion picture photoplay.

The Court: I have a copy of it, too.

Mr. Selvin: Since there have been references to the Circuit, your Honor, may I state for the record that a cutting continuity is a written description scene by scene of the action and dialogue of the motion picture, customarily prepared in connection with all feature motion pictures for record and file purposes. In other words, it provides a convenient method of ascertaining what is in the picture and in what part of the picture it is found.

The next series of exhibits marked 4-A through 4-D, respectively, in the stipulation refer to scripts of certain radio programs presented by the defendant Benny at one time or another. I will offer up copies of those scripts, or I think the defendants have them, and ask as far as we are concerned that they be marked only for identification at this time, because they are embraced within the objec-

tion that I desire to make later in the proceedings to their admissibility.

The Court: Who is going to hand them up?

Mr. Mitchell: I will produce them, your Honor.

What we have done in presenting to you examples is to have the plaintiff select as examples two scripts, and we [6] have selected as examples two scripts. The ones selected by plaintiff are a script of Mutiny on Jello, broadcast on January 5, 1936, over the radio, which should be marked for identification at this time Exhibit 4-A. In connection with that I want to say that this is the only existing script of this broadcast and I would like to have permission to substitute for it a photostatic copy in order that Mr. Benny may retain the sole remaining copy.

Mr. Selvin: We are willing so to stipulate. In fact, we are willing to stipulate with respect to any exhibit, other than the motion picture prints, that the parties may withdraw them for the purpose of making copies and substituting copies if desired.

The Court: That will be the understanding.

You say this was one of the examples selected by the plaintiff?

Mr. Mitchell: That is correct.

The Court: All right.

Mr. Mitchell: The plaintiff also selected as an example the script of a radio broadcast on January 27, 1952, of a skit or play Dr. Jekyl and Mr. Hyde, which should be marked for identification at this time as Exhibit 4-B.

The Court: It will be so marked.

(The documents referred to were marked Exhibits 4-A and 4-B, for identification.) [7]

Mr. Selvin: We have selected them, in the event the facts stipulated to in paragraph 13 of the stipulation are admitted in evidence, and that is why at the moment they are only being marked for identification, since we do object to that entire paragraph on various grounds.

The Court: I understand.

Mr. Mitchell: As Exhibit 4-C we would like to have marked for identification a script, which was selected by us, of a radio broadcast on September 18, 1949, of Edward, My Son.

The Court: It will be marked 4-C for identification.

(The document referred to was marked Exhibit 4-C, for identification.)

Mr. Mitchell: And due to a mix-up in our arrangements with the plaintiffs, we would like to hold 4-D until after lunch, if we may have that marked at that time, since we haven't had an opportunity to examine the motion picture script.

Mr. Selvin: Very well.

The Court: All right.

Mr. Selvin: I will continue.

The group of exhibits referred to in the stipulation as 5-A through 5-D, your Honor, are the cutting continuities of the motion pictures, which were supposedly parodied, satirized or burlesqued by the programs reflected by Exhibit 4. [8]

The Court: So these will be, also, marked for identification?

Mr. Selvin: Yes.

The Court: We will give the corresponding numbers, as far as the letters are concerned. 5-A——

Mr. Selvin: Will be the cutting continuity of the motion picture Mutiny on The Bounty; and 5-B, for identification, will be the cutting continuity of the motion picture Dr. Jekyl and Mr. Hyde.

The Court: It will be so marked.

(The documents referred to were marked Exhibits 5-A and 5-B, for identification.)

Mr. Selvin: And 5-C, for identification, will be the cutting continuity of the motion picture Edward, My Son.

The Court: It will be so marked.

(The document referred to was marked Exhibit 5-C, for identification.)

Mr. Selvin: And then 5-D may be reserved for the cutting continuity of whichever radio program the defendants select later.

The Court: All right.

Mr. Selvin: In the stipulation Exhibit No. 6 is the transcription of the radio program which your Honor, I believe, has already heard, and which I understand may be marked in absentia as was the motion picture, and retained in the [9] possession of the defendants subject to the same conditions and requirements.

The Court: Is that satisfactory?

Mr. Mitchell: Yes, that is satisfactory.

(The transcription referred to was marked Exhibit 6, for identification.)

Mr. Selvin: We have an objection to that particular exhibit, which will take me only a moment to state, and I might as well state it now for the record, and it can be ruled upon later; and that is evidence of that particular program and of any burlesque, parody, or satire of the motion picture Gas Light, which might have taken place on that program, is entirely immaterial and irrelevant, in that the stipulated facts show affirmatively that that particular use of the motion picture on that program was expressly orally licensed by the plaintiff, but a license to make a particular use, of course, does not extend to make any other or different use, and upon that ground we claim it is irrelevant and immaterial in this matter.

The Court: Does the stipulation of facts show that it was already licensed?

Mr. Selvin: The stipulation of facts relates to evidentiary material relating to a request made of Mr. Mayer of Loew's, and Mr. Mayer's response to it, of which we say that shows a license or consent. The defendants perhaps will [10] contend it doesn't.

Mr. Mitchell: We don't concede there was any license of that use at all, but the stipulation of facts in paragraph 17 shows a discussion between Louis B. Mayer and representatives of the defendants with respect to that particular program.

The Court: Exhibit 6 being marked by the plaintiff but not being offered by the plaintiff?

Mr. Selvin: We are just marking them all in order. The stipulation, unfortunately, did not dis-

tinguish between plaintiffs' and defendants' exhibits. We are not offering it, but since it is one of the exhibits identified in the stipulation, in order to preserve the continuity of numbering I am suggesting now that it be marked for identification.

The Court: It will be marked for identification. That radio program was in 1945, was it not?

Mr. Selvin: That is my recollection.

Mr. Mitchell: That is correct. That is referred to at the bottom of page 18 and the top of page 19 of the stipulation.

Mr. Selvin: Subject to the same conditions and the same objection on our part is the next identified exhibit No. 7, which is the script of that radio program.

Mr. Mitchell: We have the script here, which we will hand to the clerk for the purpose of having it marked. [11]

The Clerk: Is this just for identification?

Mr. Selvin: Just for identification, yes, at this time.

The Court: I think that script is already in the file here.

Mr. Mitchell: Not the 1945 one, your Honor.

The Court: Pardon me. It was the '52. Yes. It will be marked 7 for identification only. They are marked just as plain exhibits, not Plaintiffs' or Defendants'.

Mr. Selvin: There won't be any confusion, because I think there are only twelve exhibits all told.

No. 8 in the stipulation is the positive print of the first Benny television program. By "first" I

mean the first one referred to in this case, that is, the 1952 program and that may be marked and admitted in evidence subject to the same conditions as we agreed to with respect to the motion picture print, except custody in this case will be with the defendants, rather than the plaintiffs.

The Court: Is that satisfactory?

Mr. Mitchell: That is satisfactory.

The Court: Received in evidence is Exhibit 8.

(The print referred to was marked Exhibit 8, and was received in evidence.)

Mr. Mitchell: I think we should have a stipulation on that particular television motion picture, that with the exception of some details it is in substance the same as the [12] proposed television broadcast to be broadcast in 1953, which was actually photographed—I mean to be broadcast in 1954, which was actually filmed in June, 1953, since the court saw the June 1953 proposed television program and did not take time to see the kinescope of the live broadcast of 1952. But they are so nearly the same that we thought we could enter into a stipulation that they are substantially the same.

Mr. Selvin: They are substantially the same. There are some details which would be apparent from inspection, but by and large they are certainly substantially the same.

The Court: All right.

Mr. Selvin: Exhibit 9 in the stipulation is the script of the program, the 1952 program to which we have just referred, and that may be marked by reference on the copy already on file.

The Court: It will be received in evidence as Exhibit 9. That is the one the court has a copy in the file.

Mr. Selvin: Actually the copy is the one that the judge had.

The Court: There must be an original on file, also.

If the clerk can't find the original, you may use the copy which I have.

The Clerk: We found it, your Honor. The original is in the file under the filing date June 10, 1953.

The Court: Mark it Exhibit 9 in evidence. [13]

(The document referred to was marked Exhibit 9, and was received in evidence.)

Mr. Selvin: In the stipulation Exhibit 10 is the print of the proposed television program, which the court I understand has seen.

The Court: The record will show that I saw it.

Mr. Selvin: And which we may mark Exhibit 10 in absentia, and subject to the stipulation respecting its custody, which is already on file.

Mr. Mitchell: That is satisfactory.

There is one thing about that particular film as you and the court observed. The film has not actually been completed in the sense that the sound track and the picture track have not been consolidated, which may make it a little difficult to show if there should be further showings required, and I assume that there will be no objection if we at a point consolidate the sound track and the picture track, so that it can be shown on a conventional

machine, rather than in the complex way that it was shown to the court.

Mr. Selvin: No, there will be no objection to making a consolidated print for the purposes of this case.

Mr. Mitchell: And that consolidated print being the same as what the court has seen will be this exhibit that we are talking about?

Mr. Selvin: The only difference will be that the sound [14] and the vision will be on one piece of celluloid, instead of on two separate tangible mediums.

The Court: All right, Exhibit 10 received in evidence with those understandings.

(The print referred to was received in evidence as Exhibit 10.)

The Clerk: That was to remain in whose possession, plaintiff or defendant?

Mr. Selvin: That is in the possession of the laboratories right now, but there is a stipulation on file regulating the custody and possession of that particular exhibit?

It is Consolidated Film Laboratories that I think has the actual possession of it.

Mr. Mitchell: Correct.

Mr. Selvin: In the stipulation Exhibit 11 is the script of the program to which we have just referred, a copy of which may be received now.

Mr. Mitchell: We have the script which is designated "As Filmed," which serves the same purpose as—what does Metro call theirs?

Mr. Selvin: Cutting continuity.

Mr. Mitchell: Yes, cutting continuity script.

The Court: It will be received in evidence as Exhibit 11.

(The exhibit referred to was marked Exhibit 11, and was received in evidence.) [15]

Mr. Selvin: Those are all the exhibits identified in the stipulation, and I think the plaintiffs' prima facie case is made out by the stipulation and the exhibits.

The Court: You mentioned 12 before.

Mr. Selvin: 12 is a possibility, in the event the objection to paragraph 13 is overruled and Exhibits 4 and 5 come into evidence, then we would want to offer the actual prints of the four motion pictures involved.

The Court: All right.

Plaintiff rests, then?

Mr. Selvin: I beg your pardon?

The Court: Plaintiff rests, then?

Mr. Selvin: Yes.

Mr. Mitchell: Is the circumstance such now that these various paragraphs of the stipulation, with the exception of the one that you want to object to, are in evidence?

Actually the stipulation provides for the introduction of these facts in evidence, and I think before you rest maybe to make the record clear we should get in the evidence.

Mr. Selvin: I think your suggestion is a good one, and therefore I will offer all of the stipulation in evidence, except the paragraph number 13.

The Court: All of the stipulation of facts ap-

proved by me this date and filed with the clerk, except paragraph 13, is received in evidence. [16]

Mr. Selvin: And except the exhibits which have been marked for identification only.

The Court: All right.

Now, plaintiff rests?

Mr. Selvin: Yes, your Honor.

Mr. Mitchell: Your Honor, I have one witness I would like to call. Dr. Frank Baxter.

The Court: As part of the plaintiffs' case, before plaintiff rested, is the fact that I saw the showing of Exhibit 10, the print of the TV 1953 program, and I heard the radio program, which has been marked for identification.

Mr. Mitchell: And you saw the motion picture Gas Light, which has been admitted in evidence.

The Court: And saw the motion picture Gas Light, which is Exhibit 2.

FRANK C. BAXTER

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Frank C. Baxter.

Direct Examination

Q. (By Mr. Mitchell): What is your occupation, Dr. Baxter? [17]

A. I am a university teacher, Mr. Mitchell.

Q. At what university?

(Testimony of Frank C. Baxter.)

A. University of Southern California, where I have been since 1930.

Mr. Selvin: Dr. Baxter, can you keep your voice up, please?

The Witness: Surely.

Mr. Selvin: This is a large court room.

The Witness: I have been at the University of Southern California since 1930.

Q. (By Mr. Mitchell): What subject do you teach?

A. English Literature, particularly Shakespeare and the drama and English humor.

Q. You are a graduate of a university?

A. Yes, I took my A.B. and M.A. at the University of Pennsylvania, and then went to England where I received my Ph.D. at the University of Cambridge. I was a member of Trinity College. Subsequently I did some further graduate work at the University of California at Berkeley.

Q. And what particular experience have you had in the field of English literature?

A. As a teacher, and that presupposes, of course, a reader, I have devoted my life to it. I taught at the University of Pennsylvania for some years, at Swarthmore College in Pennsylvania, and after my return from England [18] went to Berkeley for one year, and subsequently I have been at the University of Southern California. I have read as much as I possibly could, and that is my only claim to being here, I suppose.

(Testimony of Frank C. Baxter.)

Q. And the particular phases of English literature that you specialized in are what?

A. The drama in the broad sense, Shakespeare in particular, and in recent years I have been doing more and more with the Shakespeare; and the history of English humor, English humorists is a course I have had for many years. With that Elizabethan Literature, a course every other year or so.

Q. More recently have you had some educational work in connection with television?

A. Yes, I have. In sort of a pioneering way we have endeavored to give a course for credit on television on Shakespeare, and the responses of course far exceeded our expectation. We have some 1250 students enrolled for credit, and a certified listening or viewing audience of about 450,000.

Q. You say "we"; who do you mean by "we"?

A. Well, I, if you will, the program, Shakespeare and I.

Q. Does that have anything to do with the university?

A. Oh, yes. This I am doing as part of my university function. [19]

Q. In connection with your studies and work can you define for us the terms burlesque, parody, satire, and travesty?

A. All these, of course, are terms that are used loosely, and in any given point the exact definition has to be determined pretty much by context. Nonetheless, the philosophers and students of the comic understand very specific things by these terms.

(Testimony of Frank C. Baxter.)

They are all, of course, manifestations of the comic spirit; they are comic forms and tones of literature.

Satire is the broadest of these, perhaps, and the most easily defined, for satire as someone wisely said is taking sides in a war of values. Satire sets up one code and tests things against it. And satire seeks to change, it seeks to criticize, to change, sometimes even to annihilate. It is a rather intense thing. You define satire in terms of its purpose, which is to make fun of, to destroy, to punish, to annihilate.

Now, that is the most corrosive form of humor, it deals with the sardonic and all sorts of things.

Burlesque and parody are sort of side by side. They balance like the pans of a scale. Parody, as I see it, is the taking off of something. You can't have burlesque and parody unless you have something to begin with. The first literature couldn't have been burlesque or parody. It presupposes the existence of something. Parody likes to [20] take a noble form and fill it with nonsense, it accentuates form, parody. If you want to parody Hamlet, you keep Hamlet, all right, but you, oh, say, "To drink or not to drink?" and in place of "Get thee to a nunnery," "Get thee to a brewery."

Parody calls attention to the form. There is scarcely an important Englishman of letters who at one time or another has not written parody.

Burlesque, on the other hand, takes serious elements from an original and plays with it. It trans-

(Testimony of Frank C. Baxter.)

poses a tone, it takes serious elements and takes them out. It isn't interested in form particularly, burlesque. It is sort of a happy toying with things as a dog toys with a bone. Now, the interest is not in the form, then, but in transposing the substance into the realm of the comic, taking it out, having fun with things, and burlesque does that.

To burlesque Hamlet, you take Hamlet as it is, but have "To be or not to be" read by a man in a bathing suit while seated on an ice cake, or having him with a broad mid-Western accent, or an Irish accent, or whatever you will. Burlesque is a toying with serious things.

Now, travesty carries this further, and travesty tends to be longer than burlesque. Burlesque is generally a short literary thing. Travesty generally takes something and transposes it violently, I think, from my feeling of the word, at all points. That is, you take W. S. Gilbert, the great Gilbert [21] of Gilbert and Sullivan, took Hamlet and wrote a play called Rosencrantz and Guildenstern, and from one end to the other the play is transposed into a comic key.

I don't know whether that answers your question.

Q. I think so. What is the first use of burlesque of which you have any knowledge?

A. This is a long story, Mr. Mitchell. Almost at the emergence of literature——

Mr. Selvin: Just a moment. We will object to any testimony along that line, upon the ground that it does not tend to prove or disprove any issue in

(Testimony of Frank C. Baxter.)

this case. The question here is what rights were conferred by the plaintiffs' copyrights, and have any of those rights been infringed; not what may or may not have been done either in ancient, early, recent, or medieval times.

The Court: The objection is overruled, and I am going to hear something about the origin of burlesque and what it means. I don't mean by that, however, to foreclose you on your objection, which I understand you are going to make, that because somebody burlesques a play, that that has anything to do with whether this can be burlesqued.

The objection is overruled.

The Witness: The greatest book, of course, in the ancient Greek world was the Iliad, and the Odyssey of Homer. Two great poems which in a way served as a sort of bible, for the [22] gods and the heroes met in that story and all of Greek literature flowed from him. It is very interesting, emerging at the very dawn of western literature you find simultaneously with Homer burlesques of Homer.

Now, whereas the Iliad deals with the heroic fighting of the Greeks, Agamemnon, Hector, and all those people, you find right with that the Battle of the Frogs and Mice, the Batrachomyomachia, which we will call The Battle of The Frogs and Mice.

Now, there is a true burlesque, because it takes the serious Homer, and here instead of having the great Achilles tilting lances at Hector, you get

(Testimony of Frank C. Baxter.)

frogs versus mice, and they talk with all the heroic language, all the tone, all the grand boastfulness of the Greek heroes.

There are also known and in part existing in fragments other burlesques of Homer as early as the sixth and perhaps the late seventh century B.C.

It is interesting in the Greek drama, which we will think of as being very poetic and tragic and intense, and an all-religious thing, which it was, where you had once a year at the Feast of the Dionysia at Athens three serious plays in an afternoon, all of them involved, again, with gods and men. This was a religious festival held once a year in honor of Dionysos. These people who flocked there with devotion saw three serious plays dealing with the heroes [23] and the gods. At the end of the afternoon there was a fourth play in which the same actors in the same costumes, often playing the same roles, put on a burlesque, violent, and sometimes even obscene burlesque of serious materials that had been dealt with earlier in th afternoon. We have the Cyclops, of Euripides, as the great remaining example of that, though there are selections, fragments remaining in the Greek Anthology, and elsewhere, of that sort of burlesquing material which ended the solemn day.

That seems to me to be a very interesting point, because burlesque, as I see it, through the centuries has been a way that man has been able to go on living in the face of the obscurity of things. He can be serious so long and then he must somehow

(Testimony of Frank C. Baxter.)

escape for a moment from that tension, and it seems to me most exciting that these Greeks would have these serious plays and then the burlesque to follow.

Aristophanes brings on to the stage in his plays in one very famous scene Euripides and Sophocles, whose contemporary reputation was tremendous, and here each one parodies his own style, that is, the character parodies the style of the original, and they talk. All through, of course, Aristophanes you have a general burlesque of things, general satirizing that relieves the tension of life. This so much in the Middle Ages.

We think of the Middle Ages as sort of a stained glass [24] window cathedral time. We think of people waiting around as though life was suspended. What the scholar knows about the Middle Ages makes it a human business.

Agnes Repplier once said how high the tide of laughter beat in the Middle Ages we can only guess by the height of the walls the church erected to keep it within bounds, for it may seem very strange to you to know that there are innumerable burlesques of the Mass, which were very popular in the Middle Ages, of the Creed, and of saints' lives. Some of those of saints' lives are just as absurd as the burlesques of Dragnet, St. George or Dragnet. That sort of thing where it is transposed utterly to another key. The type we think to have tremendous religious convictions. Maybe the fact that it was so solid with them, their faith, was why they could play with it a little; and they did certainly.

(Testimony of Frank C. Baxter.)

You have the most amazing burlesque motifs in Gothic carving, the faces of bishops. You have at Winchester Cathedral, for instance, a bishop who is really a fox dressed as a bishop and he is lecturing to a lot of geese, while from the gown behind hangs out the limp neck of a goose.

They laughed a lot at these, saints' lives, psalms, and the Middle Ages is really a paradise for a student of the comic, because you find everywhere this willingness to dabble lightly with even the things they most feared.

You take, for instance, in the late Middle Ages and the [25] coming of the Renaissance the Dance of Death, where they made fun, again to lighten the tenseness, they made fun of the sort of sudden death that overtakes men in those days when most children died in the first year of birth, when most women died before thirty and in childbirth, and most men died long before they were forty. Death was everywhere and yet they jested with it. Man has always laughed, it seems to me, in order that he may undergo and endure what a poet once called the asperity of the now, of the imminence.

Q. I would like you to address yourself, Dr. Baxter, particularly to examples of burlesques of pieces of literature through the history of burlesque, doing it briefly and in an outline form.

A. I wish we had more time——

The Court: Now, could I tell you what I am interested in?

(Testimony of Frank C. Baxter.)

Mr. Mitchell: We are interested in what you are interested in, your Honor.

The Court: There is no doubt that this is very interesting and gives us a little picture and background of what burlesque is, and if we have any dispute we could probably call many TV programs sort of a burlesque. I am more interested in what went on in England at the times of the beginning of the theatre as we know it as such, what types of burlesque were then put on. That is something I know very [26] little about. I am more interested in that than I am in literature from antiquity.

Mr. Mitchell: My question was addressed to getting just to that sort of thing, your Honor. And you understand what the court is interested in and what I have told you that we are interested in having you inform the court on?

The Witness: The drama had to be reinvented in the Western world after about 1000, and all through the early religious dramas which gave us our drama you do find burlesque elements. They made fun, for instance, of Joseph, who after all is in a rather unenviable position, in The Christian. They make fun of him.

I think it is more interesting to get down to the drama in Shakespeare's day, the great Elizabethan drama. Almost in the dawn of that you have Peele, George Peele, writing a play called The Old Wives' Tale, in which he hits at half a dozen contemporary writers by parodying and burlesquing their sort of romanticism. More interesting, I think, is The

(Testimony of Frank C. Baxter.)

Knight of the Burning Pestle, which comes about 1610, in that you have whole incidents taken from other people's plays.

There was Francis Beaumont, who wrote there, and he parodied all sorts of people. For instance, there was a new sort of drama in which an apprentice, English apprentice, proves equal to twenty-seven Turks in single combat. That is in there. Shakespeare laughed at John Lyly, a contemporary dramatist [27] who went in for rather fancy and beautifully ornamented sort of stuff, and everyone knew that Lyly was being laughed at in Love's Labour's Lost, in the fancy language spoken by Osric in Hamlet. That is pure Lyly, everyone knew that. Euphuism, as it was called.

When you get down a little later you see drama and dramatic burlesque everywhere. After the Restoration of 1660, when the king returned from exile, King Charles II, there is almost immediately a turning of wit and humor toward the theatre itself. The theatre has always laughed at itself, and here you see one of the classic examples, 1671, in a play called The Rehearsal, The Rehearsal by the Duke of Buckingham. In that play John Dryden, particularly, the enemy of Buckingham, is treated rather cavalierly, for you have themes of Dryden's made fun of. The very language of Dryden, his figures of speech, incidents from his plays, the tones of his plays, made fun of in what is perhaps I should think No. 2 among all English dramatic burlesques, that famous one of 1671, The Rehearsal of

(Testimony of Frank C. Baxter.)

Buckingham. Everyone who saw it recognized, of course, that the poet laureate John Dryden was being burlesqued. It is a great age of satire. And we can solidify this tremendously by the way these people responded. All through the eighteenth century the theatre laughs at itself.

Q. Can you give examples through the eighteenth century [28] of where the burlesquers have used the plays or literature, using plot, incidents, characters, and those parts of the originals?

A. Yes. The novel perhaps you know is a recent invention, it came about 1740, the novel as we know it with its psychological concern, and the first novel is generally considered to be Pamela by Samuel Richardson. It is a story of a servant girl who is virtuous, who finds herself being chased around the block by her master, a young gentleman named Mr. B, and he has inherited her as a servant at his mother's death, with all the other servants in this great country house, he forms this romantic loping attachment for her, and she evades him, and though the book is a series of letters in which she writes to her father, from our point of view it is rather amusing. She is in battle, she pushed the settee against the door and writes twenty pages to her father.

There was something of the good sense of the eighteenth century that found this laughable. This girl is not only virtuous, but she talks about it all the time.

So one of the happiest people in the world, Henry

(Testimony of Frank C. Baxter.)

Fielding, wrote a burlesque called Shamela. The first was Pamela, and this is the burlesque way of doing things, you call it Shamela. In here the girl goes through all the things that happened to her. While it is shorter than the [29] original, the key incidents are used. The girl is pursued by her master, but her retreat is strategic, rather tactical, rather than ideological. She lures him, and she jumps out at him, and she disappears, she baits him, and she is a calculating little wench. And of course it is a magnificent burlesque, and you follow point by point the events, the significant events of Pamela, in this Shamela. It was so successful that Henry Fielding, the father of the English novel, came back in the next year 1742 with Joseph Andrews.

This is a famous old novel. In this you have a young footman who is pursued by his mistress. You see the transposing trick of burlesque, and Joseph Andrews is a virtuous young gentleman who is conscious of his virtue and talks of it, and he is pursued by his mistress, and she chases him around the block, to sum it up neatly.

Soon Fielding, introduced certain characters who became so three-dimensional and so much alive that he changed the nature of his burlesque and made it a novel in its own right, what he called the comic epic, but it begins with the burlesque, again, of Richardson, focused right on this particular book.

All through the eighteenth century you can find such things. Sheridan's The Critic is clearly directed at three or four playwrights of the day. That

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is probably the greatest, I think, of English dramatic burlesques, The Critic by Sheridan, [30] in that he laughs at three or four people. This thing goes on all through the eighteenth century.

Q. Does The Critic use excerpts from the originals in terms of incidents, characters, and so on?

A. Yes, he does.

May I show you this, which is one of my treasures? This is a book written by Dryden back in the old century, a very serious work for him, for it was a declaration of his faith, The Hind and The Panther, a poem in three parts, 1687. It is in verse, and in a sort of Aesop's Fable sets forth the various religious parties of the day. The milk white hind is the Catholic Church, the panther is the Church of England; the timid, quaking hare is the Quaker, the bristling boar the Baptist. And they all go through this, and it is a solemn declaration of faith, all of this. Two of his enemies politically and two wags of the day brought out in the same year this book (indicating), and many men I think bought this one thinking they were getting this one (indicating). The format is practically the same. What it does is change the panther and the milk white hind to the town mouse and country mouse, and from the very first line it is burlesqued, line by line, with a lot of intruded comment in prose to make it very clear.

This is one of the very famous literary burlesques, The Hind and The Panther, and The Hind

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and The Panther transposed by a man named Prior and another named Montagu. [31]

The Court: There wasn't any copyright law in England at that time?

The Witness: Not in the modern sense. Only the stay of titles.

May I continue?

Q. (By Mr. Mitchell): Yes. I would like for you to continue with some examples along the line that the court is inquiring about, examples of burlesques of plays and perhaps books, where the material in the book is used as a basis for the burlesque.

A. One thing of course that held down a great deal of burlesque was this—it is amazing there is so much—but there were only two licensed theatres in London from 1660 to about 1850, there were these two licensed theatres. When times were very good and business was good the British officialdom didn't interfere with little theatres that sprang up, but whenever times got hard they put them down. So the big theatres were engaged in solemn undertakings of one sort or another, and there was no place they could be burlesqued. But after 1850 it seems to me the floodgates opened, and a little later I would like to give you a list of some of these burlesques which you can see by the title to be true burlesques.

The Court: Let me get this straight. In this period that you refer to, 1660 to 1850, there were two licensed [32] theatres in London?

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The Witness: Yes.

The Court: And I take it outside of London there was very little dramatic art produced?

The Witness: In the provinces they were generally served by the London theatres who went on tour in the summer.

The Court: The two theatres who went on tour?

The Witness: Yes.

The Court: These theatres competed, I suppose?

The Witness: They did.

The Court: In the history of that period is there any situation where one of the theatres would put on a serious play and the other theatre would then burlesque that same play?

The Witness: Yes. That is very true, and you can see that in the volumes of old John Genest, The Annals of the English Stage, down in 1832, how in the first turn of the century they have Covent Garden and Drury Lane. You see that competition in this. You see that our ancestors didn't go to see a play, they went for an evening's solid entertainment. They saw a curtain raiser, which was a farce, they saw hornpipe dancing, a slack wire artist, they then saw a comedy, they could see a burlesque, and then see a serious play, and then a pantomime after-piece, often. So that they went four or five hours at a stretch to the theatre. And it is in those [33] comic skits that you find this sort of burlesque. Allardyce Nicoll's History of The Early Nineteenth Century Drama tells about these things.

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The Court: I asked a question and there were two parts to it, and you said yes, and I don't know whether you said "Yes" to both parts. I asked whether the theatres competed, and you are now telling me that they competed.

The Witness: Yes.

The Court: These two theatres, were there occasions when one would run a burlesque of the other's serious play?

The Witness: I wish I could answer that directly. My feeling is yes, but I couldn't give you anything specific at this time. There was competition there in this——

The Court: Let me back up a minute. I don't mean did they take one character out of a play and take a shot or two at him, or did they take one situation, but were there situations where one of the theatres competing with the other would take the theme, the dramatic incidents, the sequence, practically the story, the same characters, and then put it on in a burlesque of the other theatre's serious play?

The Witness: Yes, and yet I can't give you a specific reference. You will find in Allardyce Nicoll they did this, because there was a great deal of keen competition. Say Hamlet was given in one theatre—that is not a good example. Take a more recent play, a play on the British Navy, one [34] theatre would have it, and they would give the sol-

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emn play; Covent Garden over here would have a burlesque on that.

I wish I could give you names and dates. I can't at the moment.

Q. (By Mr. Mitchell): You are talking about these ancient, or, rather, a long time ago, these two theatres, but while we are on this subject—and the court is particularly interested in this subject—while we are on this subject can you bring down to date, starting as early as you can, examples of where a competing theatre will be burlesquing a play being played by a theatre, a serious play by a theatre on another street?

A. Yes. Of course, after 1850 the theatres spring up everywhere and are all in active competition.

Q. They are in active competition, but what the court is particularly asking you is whether in engaging in this competition one theatre would play a burlesque of a serious play being done in another theatre, and he would like to have you answer that and give examples, I think, right down to now, starting as early as you can.

A. I would like to do that.

The Court: I will tell you why I am interested in it. Largely from the standpoint of knowing what kind of a background was presented to the early judges who first wrote and passed on these matters. In other words, cases aren't [35] decided in a vacuum. I have been trying to find some of the earlier cases on this matter. Those judges didn't write in

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a vacuum. They wrote knowing certain facts that then existed.

Mr. Mitchell: The reason for this witness is we are trying to bring these facts to your attention, your Honor.

The Court: I am interested in this solely from the standpoint of being better able to understand what the judges were talking about.

The Witness: Yes. You take about 1805, one of the theatres discovered a child actor who was eleven years old, Master Beattie, and he played Macbeth to one of the eighteenth century tragedy queens who lived over in this age, whereas the other theatre immediately brought out Miss Clara Mara, age five, who played Lady Macbeth, but the Macbeth they used here was Stephen Campbell, who was so fat that he boasted he could play Falstaff without padding, and the whole attempt there was clearly to make fun of this other child actor.

The thing soon ran itself to earth. Covent Garden imported a troop of trained horses which appeared, and every play written for Covent Garden had to involve the evolution of a trained troop of horses. Drury Lane then imported a troop of elephants and each side made fun of the other in this.

Q. (By Mr. Mitchell): What I particularly would like to have you do for the court, if you will, is give us examples [36] of plays, serious plays, that while they were playing on one street were burlesqued in a theatre on another street, if you have such examples.

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A. May I go through it this way first, and then come back to it? Some of these I think will emerge.

The Court: The reporter has been pretty busy. We will take a short recess.

(A recess was taken.)

Q. (By Mr. Mitchell): Again, Dr. Baxter, what we would like to have you do now in connection with this history of burlesque that you are giving us is to give us some examples of burlesques of plays where the story line or the incidents in the play, in the serious play, are burlesqued by some rival theatre, and then we can go from there to where burlesques of stories or novels are used as a take-off point for burlesques of rival authors who use those as a basis of burlesque, but let's start first with the plays.

A. I am sorry to seem so obtuse. From Victor Hugo's Hunchback of Notre Dame you get Quasimodo, The Deformed, or The Man With The Hump, a burlesque at one of the minor theatres. Another one, Miss Esmeralda or The Maid and The Monkey——

Mr. Selvin: Can we have the dates of these as we go along?

The Witness: I haven't them specifically. [37]

The Court: Give us the century.

The Witness: This is all the nineteenth century.

The Court: The 1800s?

The Witness: 1800s.

The Court: After 1850?

The Witness: Yes. The proliferation of the

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theatre made possible the many theatres in competition and you get this sort of burlesque. While Monte Cristo was running, you will have a burlesque running called Monte Cristo, Jr.

The Court: Let's stop just a minute. You mentioned two or three burlesques of the Hunchback of Notre Dame. Were those burlesques burlesques that used the same characters, the same sequence of events, the same dramatic climax, the same finale and so forth?

The Witness: Those that survived show a lot, and Allardyce Nicoll lists them, show a very close parallel.

The Court: Who lists them?

The Witness: Allardyce Nicoll.

The Court: In what book?

The Witness: Allardyce Nicoll, two volumes, The History of Nineteenth Century Drama.

By the very nature of these things they are ephemeral and don't get into print, so we can only generalize from what have come down to us.

But like all burlesques, they tie in recognizably to the [38] drift of the play they burlesque. Often the characters are given names which are punning variations on the name of the original. You can see that in some of these titles. You get The Three Musket Dears; or The Gay Musketeers, or All For Number One, which is certainly a burlesque transposition.

Trilby toward the end of the century, further along, had a tremendous vogue, and had one of the

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longest runs in the theatre, DuMaurier's Trilby. And while it was running you have A Model Trilby, or A Day or Two After DuMaurier, which is one of those Victorian puns. A Model Trilby. She was a model, you will remember. And you get one called Thrilby, which is clearly a burlesque transposition of the other.

Stevenson's macabre story, which has been referred to today, The Strange Case of Doctor Jekyl and Mr. Hyde, pops up in the nineties at one of the minor theatres as The Strange Case of A Hyde and Seekyll.

The Court: Now, let's take that. Is a script available of that burlesque?

The Witness: No. All we know is what historians tell us about it.

The Court: Outside of the name was there the same plot, namely, the one character who had the two parts to his make-up?

The Witness: I can't say specifically about that, but [39] the presumption is so, because that is the way it burlesques. Where we have the scripts it is clear, that you take the thing and you take-off from it. You identify your burlesque with the thing burlesqued in such a way that we feel instead of the heroine turning to the right, she is going to turn to the left, but the incident over here (indicating) is behind the incident in the burlesque.

As I say, these things are ephemeral and often all we know are titles and what the scholars of the theatre have been able to dig out of contemporary

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reviews, actors' memoirs, and things of that sort. When we get closer to ourselves we can see some of it.

I think one of the most popular plays ever written in England was The Lady of Lyons. This was never off the English stage very long between 1838 and the end of the last century. It was as popular in Philadelphia and in the gold rush towns of the Mother Lode in California as it was in London or the English provinces. It was an exciting play, it was interesting. It was admired, and of course it was burlesqued endlessly. Here are some of the burlesque titles: The Lady of Lyons Married and Claude Unsettled; The Lady of Lions, or Clod—instead of Claude—The Bellows Mender; The Lady of Lyons, or, Twopenny Pride and Pennytence; Ye Ladye of Lyons.

I found the dates of five other burlesques of this stock [40] play before 1879.

Bulwer-Lytton's Richelieu was burlesqued; Ion of Talfourd was burlesqued many times; Ivanhoe, the dramatic version of Scott's Ivanhoe was burlesqued through the nineteenth century.

Q. When you say "burlesqued," the court is interested in knowing—when you come to a point, tell us whether the burlesques used incidents, characters, and story line from the original.

A. Such a thing as Henry Irving's success in The Bells is followed by The Bells Bellesqued. These Victorian puns are incredible. And there you

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do have the central character going through the various events and the burlesques follow this.

The Dancing Girl of Henry Arthur Jones became The Can't Sing Girl. This is Victorian. Ingomar, The Barbarian appeared in 1851. While it is running, at a neighboring theatre there is something called Ingomar, The Idiotic, which can only be a burlesque, and is so catalogued.

Another famous play of the nineteenth century was The Corsican Brothers—the Pasadena Playhouse played it recently—by an Irishman named Dion Boucicault. Immediately there appears at a neighboring theatre The Corkonian Brothers. You get the natives of Cork, and now you see the events take place with an Irish brogue. He himself wrote Irish plays, [41] Boucicault. He wrote The Colleen Bawn, which remained on the English and American stage down to World War I. You get a burlesque of that called The Cooleen Dawn. Arrah-na-Pogue becomes Arrah-no-Brogue.

These things are all through the eighteenth century.

Ibsen himself wrote a burlesque of one of his plays, but the English stage burlesqued him, Ibsen's Ghost. And James M. Barrie began his literary career by writing a burlesque of Ibsen.

One very interesting case in point is Tennyson's The Princess. And here we have the thing very clearly seen. W. S. Gilbert takes it and calls it a respectful perversion, but he transposes the story to a comic key from one end to the other, and it

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is Princess Ida, one of the famous Gilbert and Sullivan operettas.

Q. There is an available script or description of that?

A. Yes. Many of these things exist, most of them exist, if they exist at all, only in the Licensor's office in London.

The Court: Have you inspected The Princess by Tennyson and Gilbert's Princess Ida?

The Witness: Yes.

The Court: Is the sequence of events the same?

The Witness: It isn't complete, it doesn't follow completely the whole chain, but enough. That is the way [42] of burlesque. It ties in this event and another and is recognizable from the original, because it has enough points in common. It doesn't follow the whole thing right through. I know of no burlesque right through which follows every point in the development of a work.

The Court: Of course if you had a copy that followed the other point by point to start with, you would have a Chinese copy. Now, if you had a copy that went through point by point, and therefore it would be obviously of equal length, but that merely converted the serious to the humorous, would you call that a burlesque?

The Witness: No, because as I would like to say a little later, burlesque tends to be short. The comic cannot be too much sustained. The critical laughter of burlesque selects, it is a selective art; it takes this, that and the other. Of course, without

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its original it couldn't exist at all. It is an ancillary thing, it is a secondary thing, in that it must follow the original.

The Court: These questions don't indicate how I am going to decide this case. I am just testing out various thoughts that go through my mind.

Supposing that there had been written a play that took the customary length of time for a play or motion picture, in a serious vein, and then someone took that play and cut it down, say, to a 15-minute television serious play, which would [43] mean that they would have to take the same general characters, they would have to take the plot and the climax, but they would have to leave out a lot of the filling material, but actually they cut it down and made a 15-minute short out of the long, serious play, the result would be that they had taken the heart, the guts of the play, and put it into the short 15-minute deal. Now, supposing a 15-minute burlesque was made which was based on this 15-minute serious item, namely, the burlesque had the heart, the substance, the sequence, the climax, the characters, boiled down: would you consider that a burlesque of the original serious play?

The Witness: The transposition of the topsy-turvydom to another effect is important here. When you burlesque something it is obvious you can have many approaches. You can just take the plot line, the development of incidents, and follow that. But from the point of view of a student of literature,

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I think those are the less important things in a work of art.

If I might mention Gas Light, it is very clear that the virtues of that play are not in plot particularly, but in the atmosphere, the tremendous atmosphere, the rich characterizations, the theme, the growing suspense.

Now, the burlesquer who looked at such a play back in the nineteenth century would not take the rich characterization over, he wouldn't take the growing psychological montage [44] of suspense; what he would do would be to take the events in order to string his nonsensical perversion on it.

It is a little complicated. You are dealing here with tone, sometimes with poetry. It seems to me that you could make a very good case for Gas Light as being a sort of poem. It moves you in just that way.

Now, in any serious play—and Shakespeare of course has been more burlesqued than anyone else on the English and American stage—when you take King Lear or Othello, you don't deal with it on its own terms. To give a 15-minute boiled-down version of The Tempest or King Lear in a serious way would of course not constitute burlesque. To select here, there, points from that, here, there, characters, not taking them in their own terms, but carrying them out in the comic, caricature, is the way of burlesque. Burlesque doesn't take characters out and put them over here (indicating). I don't think so. What it does is take the idea and then make

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a new character which is a monstrous joke on the other one. That is the way it has always been in burlesque.

The Court: Go ahead.

Q. (By Mr. Mitchell): Now, you were going ahead with some examples where you knew something of the story line and incidents in the burlesque as compared with the story line and incidents in the original which is being burlesqued.

A. You have a whole, rich history of English parody [45] where people in their own lifetimes having written books suddenly find their work parodied. You find that at the beginning of the nineteenth century. Rejected Addresses, which was a series of hilarious suggested addresses for the reopening of a theatre that had burned down, Drury Lane.

Q. What I would like to do is to stick to story line and incidents, Dr. Baxter, for the present.

A. All right. Let's take these books, if I may. This book was a best seller in 1929.

Q. What is the name of that book?

A. Joan Lowell's The Cradle of The Deep. You will perceive its end papers here which show maps. This one is a story put out by this girl published by a reputable publisher in 1929, which tells how she was brought up at sea on a sailing ship. It is full of the most amazing events.

Q. Serious?

A. It is a serious book, yes, though its authenticity has long since been questioned, although it

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was launched as a book of a girl's growing up at sea. It was either then autobiography or fiction. But it was a serious book. It was a best seller and had many reprintings in its first year.

Simultaneously with its vogue comes this book called Salt Water Taffy. And, again, the very end papers are eloquent here. This is a story of a girl who is raised at sea. Chapter by chapter, book No. 1, the original, is followed [46] in this mocking burlesque. The burlesque is by Corey Ford, who at one time wrote a tremendous lot of stuff for American magazines, and so forth. You have a chapter in here where she learns about sex from dissecting a shark that has been hauled aboard.

Q. Is that in the original?

A. Yes. "We catch a female shark and I learn about women from her," the chapter is called.

Corey Ford has a chapter in which the shark most amazingly reveals not only the facts of life, but a lot else. They find the remains of two sailors they lost days before.

In the original book she walks in the dance of village virgins. In Corey Ford's book she decides to join the virgins as a retroactive virgin. And the whole thing is transposed into this sort of nonsensical key, and here they are on the book stands at the same time, and both by publishing houses in the United States.

The Court: Just interjecting, of course the study you make of the matter from the standpoint of the literature is entirely different from the thing that

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I have to decide. Whether Corey Ford could rightfully do that is an entirely different question from whether he did it. Joan Lowell may have welcomed this parody. It might have furthered the sale of her book. We don't know. But getting up to the present, I am inclined to think that the fact that other parodies were [47] made or other burlesques were played has no bearing on the legal issue.

I am interested in what went on in certain periods from the standpoint, particularly the early periods before 1850 and after 1850, as a background for knowing what the judges were thinking about in deciding some of these cases.

Mr. Mitchell: Let me suggest to your Honor, this is not the time to argue it, but we pointed out in our opening memorandum, and when we file a further memorandum, as I think it is our purpose to do if your Honor will permit it, both sides I think want to file something in reply, we have pointed out and we want to further point out that I think this is material on the basis of custom, that is, that it is fair use, one test is whether it has customarily been done. And in addition to the reasons which are impressing your Honor, I think the literary history which we desire to give you will be some indication of what in literature has been a custom over a period of a very long time. Now, that doesn't make it necessarily fair use, but that is one element of fair use.

The Court: I will have to think about that matter of custom. It has also been customary to steal

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from the other man from the beginning of time, if you want to talk about customs. Kipling at the end of his volume of verse has that final verse about:

"When Homer smote his bloomin' lyre
He'd heard men sing on land and sea,
And what he thought he might require
He went and took the same as me."

So custom would work both ways.

I am not going to pass on that. I have this thought in mind, that where a case is tried without a jury the admission of evidence that is not competent is not error, because the Circuit Court will indulge in a very generous presumption that the trial court separated the wheat from the chaff, and I may let it all go in upon the theory that no harm can be done, and it will be then available on appeal.

Mr. Mitchell: We would like to go ahead with it, because even though as you say there may be a custom to do some stealing, yet unless this custom can be upheld the form of burlesque which has been customary will thereupon become obsolete, will become prohibited.

I am not asking your Honor to decide that question now, nor do I think this is the time to argue that question, but I think the background should be here, and in the light of that background you can then decide it one way or the other.

The Court: All right.

Q. (By Mr. Mitchell): Can you go on with some more examples of plays? We are back in the 1800s now. We can come into the 1900s with plays,

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where you can recognize, [49] between the serious play and the burlesque of it, a connection in terms of story line, or characters or incidents.

A. I would like to note that progressively after 1900 there appeared a new form of theatrical burlesque in what might be called the brief potted burlesque, and you meet it year after year in the Follies, Ziegfeld Follies, you meet it in George White Scandals, in The Passing Show, The Passing Show of 1912 took the incidents of Paid in Full, a contemporary success in the Broadway theatre, and made fun of it. Trixie Friganza was in that. These things still go on.

One of the basic inevitabilities in a modern revue is some book or play or contemporary story will be treated in this burlesque way.

We remember the Little Show, Weber and Fields and Fay Templeton and William Collier, and so on, year after year had as a policy—this is what the reminiscences of Weber and Fields reveal:

"We had a regular book that was legitimate burlesque of some New York hit such as 'The Christian,' 'Heart of Maryland,' or 'The Messenger Boys From Mars.'"

In the history of the New York stage we see burlesques given in the first part of this century of Arizona, Barbara Frietchie, Bohemian Girl, Camille.

By the way, grand opera from the very beginning was [50] burlesqued in which they did most rowdy things with events and the people of the original.

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but it has always been fair game as Shakespeare has, as Cervantes has, as the very greatest of things always have. Cyrano was burlesqued, East Lynne.

Q. When you say they were burlesqued, what do you mean by them in terms of these Weber and Fields shows you are talking about?

A. Slapstick version.

Q. In which the incidents and story line are used in the story?

A. Yes, sir. You have Madam X, Paid in Full. I found burlesques of all these things, which identifiable with the original, the burlesque makes fun of the situation and the people and the theme. Paid in Full; Anna Christie, Three Weeks, Pollyanna, The Girl of The Limberlost, The Sheik, Lightnin', What Price Glory, The Front Page, The Green Hat, The Constant Nymph, Tobacco Road, many burlesques of that, Abie's Irish Rose, Winterset, The Hairy Ape, Gone With The Wind, South Pacific.

The Court: In that connection, in your investigation of course you had no way to ascertain whether or not there was permission?

The Witness: No, I have no knowledge of that.

The Court: We can probably guess or assume that in a certain number of cases there was no permission. Certainly [51] in cases where the author would be dead.

The Witness: Of course from the purely literary —I realize my ineptitude here to face the legal

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issue. All I can say is men have always laughed at each other, and it is a form of recognition that good things are laughed at, the cheap, the tawdry, the inconsequential get satired. If it gets any treatment at all it gets the corrosive, destroying treatment of satire. But you get Shakespeare and Cervantes and Homer and Virgil, the most important things written, and they are burlesqued again and again and again with this sort of loving, fondling treatment. It isn't to destroy, as satire does. The poor things are. The important thing is among men of letters there is a feeling that to be burlesqued is to be noticed.

Dickens, for instance, learned that William Makepeace Thackeray was burlesquing in the London Punch contemporary novelists, and he watched week after week and there was no burlesque of him. He had had a little estrangement with Thackeray. So he let it be known he wanted Thackeray to know he would be happy to be burlesqued.

You will find the poet Campbell agonized that he wasn't burlesqued. You find Edwin Booth who was playing Hamlet in New York happy for the chance at a matinee when he didn't himself have to play to go over and see a comedian of the time burlesque Booth's way of playing Hamlet. [52]

I think it is to be noticed, it is a form of criticism. Now, often, again from the purely literary point of view, if a man must sanction those who burlesque him then surely he has the right to pick his critics, and that would be, it seems to me, the

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death of all forms of criticism, including this rather gentle and playful one called burlesque.

Q. (By Mr. Mitchell): In the history of literature is there any evidence that these numerous burlesques were done with the permission of the author of the original?

A. I know of no case. It may have been, of course, but I rather doubt it. These are independent arts.

Q. Are there some well-known authors who began their careers as authors of burlesque?

A. Yes. I mentioned Thackeray, the great novelist, who began writing amusing little burlesques. Jane Austen, a great novelist whose reputation today is higher than ever, began her career with a burlesque of a certain sort of novel popular in her time. Indeed, of one particular novel specifically.

Q. In that burlesque was the story line, and incidents, characters, used in the burlesque?

A. Yes. Northanger Abbey. Many other people began that way.

Q. With respect to these burlesque skits in The Passing Show and George White's Scandals, and Ziegfeld Follies that [53] you mentioned, did those burlesques use the story line and the incidents in the original?

A. Yes. For instance, you take Tobacco Road, I remember this in one of the reviews, I have forgotten which, your Honor, you have Tobacco Road; now Tobacco Road is a very sordid story of humble people, full of hookworm and poverty, and what

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you do when you burlesque it is put them in silk hats and have them on Park Avenue deploring the fact they have to live this wretched, denying, thwarting type of life, and then it becomes Tobacco Boulevard. I have some more.

Q. I would like to have you finish your examples, yes.

A. Benchley, Robert Benchley for many years criticized Broadway hits. He developed a technique, which he and other people have used, of burlesquing, say, a scene of one of those plays, but so treating it that in his burlesquing of it he called attention to what he thought were the weaknesses as well as the validities of the thing he criticized.

You can see that very beautifully at the time of Hemingway's novel Across the River and Under the Trees, which is a story of an Army officer who has had World War II behind him. He has fought all over Italy, now he has a bad heart, living on borrowed time, and in Venice for a short time he has a belated, wistful love affair with a young girl who to him is beauty and youth and all the things that somehow [54] eluded him, and it is a very philosophic play. The best review of that, I think, was a factual, almost parallel parody in the New Yorker by E. B. White, the famous paragrapher of the New Yorker, in which his old man thinks about things not quite the same things as the hero of the story. There is the girl, there is the atmosphere, there is the bad heart, and all of it, but it is transposed to this burlesque key.

(Testimony of Frank C. Baxter.)

Benchley did that, of course, a great deal. Newman Levy did it in reviewing operas in New York for many years in the old Life Magazine. Ring Lardner reviewed plays by parody. Certainly anyone who has followed the fortunes of the theatre in our time knows that he may find Jimmy Gleason or Henry Morgan or Bob and Ray or Sid Caesar or Imogene Coca, or any of these people popping up with some burlesque version of some reputable play, movie or whatever it is. Beatrice Lillie for many years appeared in various reviews, and still is appearing in reviews, in which she and her colleagues, Mr. Gardner and others, had fun with works of literary art of our time.

Your Honor, I have made certain points in summary about the history of burlesque. Might I be permitted to read them to you?

The Court: Yes.

The Witness: It seems to me a thoughtful study of the [55] history of the spirit of burlesque would lead a man to these conclusions:

First, that burlesque as a form of comic art is as old as literature. Even among primitive people who see it. As soon as institutions jell you get burlesques of them. And its traditions are cumulative and unbroken. There has been a long evolution to the burlesque as we know it today all through the history of literature. It has always been accepted and sanctioned as a separate form of literary art requiring a different sort of genius from the original creation, an established mode of laughing criti-

(Testimony of Frank C. Baxter.)

cism: Henry Fielding, Jane Austen, Thackeray began by writing this. Almost all great writers,—I would defend this against any one of my age and weight in generalization—almost all great writers somewhere in their career have written parody, satire, or burlesque.

Second, burlesque, it seems to me, cannot use bitterness or rancor. Burlesque is a happy thing. It exists to give fun; it doesn't try to reform anything, change anything, slay anything. I think satire does. Satire is purposive laughter. When Dorothy Parker reviews Katherine Hepburn in The Circle, "Miss Hepburn ran the gamut of emotions from A to B," that is murderous. Burlesque doesn't do that. It hasn't bitterness. It seems to me the tone of the particular thing under discussion is the test. Is it fun? [56] Is it intended to be fun? If it is harsh or deeply critical, I don't think it is burlesque.

Satire, as someone said, is brimstone; burlesque is wine. It is merely spoofing, and the tone of it is the test.

Third. Burlesque is rarely personal. It doesn't attack individuals, but rather modes, styles, forms, tendencies, or focuses upon one work.

Now, the question has been raised here about story line. As a student of literature and some humble critic of it, I think some important works of literature are rarely the stories. There are only a few stories in the world. In Othello we have Iago progressively driving a fellow mad by one thing

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after another until the heap of it is preponderant. In the Duchess of Malfy, the play by John Webster, you have two brothers driving a sister crazy. Plot is not important. Shakespeare took all of his plots, borrowed them, swiped them, all except one, and the critics always say the source of Love's Labour's Lost has not yet been discovered.

It is what they do with these plays. You can make a fortune by rewriting Cinderella in modern terms.

So I think burlesque likes to look at style, it likes to look at characterization, at the poetry, at the theme of a work of art. [57]

Then, four. Burlesque is rarely of a whole work of art. It is short, shorter than other things. It is never a substitute for the original, but a transposition of the original into quite a different key. Invariably much shorter. It concerns itself with parts, parts which it borrows because it is burlesquing, B is burlesquing A, and there are enough things borrowed to tie in the burlesque with the original.

Another thing burlesque does is it stuffs and adds things which are outrageously far-fetched and brings them into its burlesque. If you are burlesquing Ivanhoe, Ivanhoe may stop half way through and shave with a safety razor. You bring in absurdities from without. So most burlesques of which I know anything are funny, often not because of what is borrowed but what is brought in. And in sheer time in such a thing most of the time goes to the stuffing, there is where the fun is; the

(Testimony of Frank C. Baxter.)

other is just a sort of excuse for playing with an idea, playing with a theme.

Five. Burlesque changes the tone of the original; it turns the serious into the comic, and the comic into the serious. It uses all the comic tricks of exaggeration, grotesquery, topsy-turvy. As in Tobacco Road, poor Jeeter Lester becomes the father of some marriageable daughters on Park Avenue. It loves to confuse the high and the low. Always a different tone, different thing entirely. [58]

Six. It rarely bothers itself with the evil or the sham, the ignominious and the failure. You don't burlesque a failure. It turns toward the popular and the successful, historically. Satire is the tool by which men level the failures into dust.

Seven. Burlesque is a sort of compliment. Monk Lewis was a famous writer, novelist, at the end of the eighteenth century, who burlesqued himself anonymously. Swinburne burlesqued himself, the poet Swinburne.

It is interesting as a student of the comic, I can say this without fear of doubt, that it is the most respected things of literature that have been most thoroughgoingly and habitually burlesqued.

Then here is a very interesting point, your Honor, I think, about burlesque, because it is a manifestation of the comic spirit: It loves to look upon anything different, fresh, and strange. Burlesque as a manifestation of the comic spirit is one way in which society tests the validity of the new.

George Meredith said the comic spirit is like a

(Testimony of Frank C. Baxter.)

great bird, beady-eyed and alert, hovering over society at all times ready to penalize any divergence, and it is always on the alert. And burlesque is part of that comic spirit. It laughs at things that are new, the things that may be tomorrow's gospel, but it laughs at them and tests them with [59] this touchstone of laughter.

Can things stand being laughed at? The church has been laughed at. The law has been laughed at. Medicine has been laughed at. My profession is a common target for the smallest boy. What hasn't been? And that is one very basic human thing, that men will laugh at what seems strange and new to them.

Nine. Burlesque historically has flourished in those societies where there has been most democratic liberty.

Ten. If burlesque is pornographic, coarse, vulgar, scurrilous, or addressed to the deformities and personal misfortunes of individuals, it is not burlesque. Burlesque is a happy toying with serious things. If, in history, it seeks to touch corrosively upon a personality, it doesn't come down to us; it dies, it is not successful.

Then this very interesting thing I would like to say.

Eleven. Through the long millennia of western civilization the stage has always laughed at itself. The stage has always laughed at itself, whether it is in the minstrels of the nineteenth century, the revues of the twentieth. The stage has a lively

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interest in the stage, and has always done that, and that goes back to the Greeks, back through the Elizabethan and the great age of English drama to the ancient Greeks.

Twelve. There have been very few important novels, [60] verses, or plays in the history of literature, not only English and American, but world literature, there have been very few important novels, verses, or plays that have not been burlesqued in their own time.

These generalizations one can document at length. I believe them here as a witness to be quite true.

Q. (By Mr. Mitchell): Dr. Baxter, from the standpoint of a student of literature, what are the literary values of the play or motion picture Gas Light?

Mr. Selvin: I object to that upon the ground that it is immaterial and not an issue in this case.

The Court: It is a preliminary question for what purpose?

Mr. Mitchell: The purpose of showing your Honor that the literary values of Gas Light are not used in the burlesque, but rather things are taken from Gas Light which do not constitute literary value, and the burlesque creates for itself a literary value out of things that don't come from Gas Light. I think that should be one test of the validity and propriety of burlesque, whether you take the real values.

The Court: I won't let him go so far as to testify which values were or were not taken, but I

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will overrule the objection and he may state what he considers to be the literary values of Gas Light.

Mr. Mitchell: The motion picture or play.

The Witness: Well, from the very first moment I think you sense the atmosphere, the dark, rather dingy Victorian, heavy architecture, the clop-clop of the horses, the weeping girl, and all that. It seems to me atmosphere is tremendous here. I can't imagine this being quite as effective if it were laid in Iowa, or anywhere else. But you get somehow a way of life, an atmosphere of that time. Then you get in another sense atmosphere of suspense. From the very beginning you sense somehow this girl is doomed. You feel that it is going to work against her.

I was tremendously conscious of that, of the growing suspense, and of this thoroughly and completely realized atmosphere of a bygone time. These two things.

Then, I think the characters. I think the girl who is after all simple and naive and finds herself faced by this tremendous horror she can't quite localize, she doesn't dare find it herself, her character is perfectly clear. Even the servants emerge clearly, slight as they are in the action. Then the husband is of course fascinating, this man.

It seems to me it is the atmosphere, the suspense, the characterization.

Then I think in our day we are tremendously interested in the individual, and more than men have ever been in [62] literature, we know that no

(Testimony of Frank C. Baxter.)

drama is important unless it is the drama of man against things, the things that press upon him. And in this you find this girl is alone. What will save her? You identify yourself with her. I think the literary virtues are in these things, Mr. Mitchell.

Q. (By Mr. Mitchell): What in your opinion, Dr. Baxter, are the literary values of the burlesque, the Benny burlesque?

A. Certainly they are quite different. I don't believe for a minute in any of the characters. They seem to me gross perversions. They live in the comic world where people can get away with things. I don't believe the lady is under great stress; that she can't have her dinner in bed, because she has had her other meals in bed, and the bed is filled with dishes. That is pure burlesque. The fact that at the most inappropriate minute a girl comes in tumbling or the plaster falls, or in this topsy-turvy world the butler walks upside down. Don't you see?

Freud I think explains a great deal of our modern laughter. He said among other things about laughter, we are all so put upon by laws and rules and regimentations and so on, and it is growing as society fills up, that in the comic we celebrate the person who is free. He lives in a sort of pure stream of consciousness, the comic character, he gets away with things.

Now, the tensenesses of Gas Light over here were most [63] moving, disturbing. But in this madcap thing nobody is responsible for anything, and you

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happily identify yourself with these free people who do the most outrageous things. And if the butler comes in upside down, you accept that as a way of life in this never-never land.

I think it is fun, and it has that sort of comic escape from reality that we seek in our day. Thurber, Perelman, Ogden Nash, the three most important figures now writing comedy in America, are all people that say, "Come with me into a mad world where no values hold, where you won't be oppressed." And that is what this has. It is a typical bit of middle nineteenth century humor in this: that it lets you into the world free.

That is a very desirable thing, because we can't live by tension.

Q. You spoke once, I believe——

The Court: How much longer will your direct take?

Mr. Mitchell: It won't be much longer, but since he is going to come back anyway, if you would like to break now, very well. Whatever you want to do.

The Court: I suppose the Irish wake is an example, also, of this release from tension?

The Witness: I think so, oh, yes, oh, yes.

The Court: Not being a student of literature, but being an Irishman, I understand that a little better. [64]

We will take an adjournment until 2:00 o'clock.

(Whereupon at 12:15 o'clock p.m. a recess was taken until 2:00 o'clock p.m. of the same day.) [65]

The Court: Proceed.

FRANK C. BAXTER

called as a witness by and on behalf of the defendants, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Mitchell): In your testimony this morning, Doctor Baxter, you used the phrase, in connection with burlesque, of taking off the original. What did you mean by that?

A. Mr. Mitchell, I think that is a very excellent synonym for burlesque, take-off from something. It does not parallel in the sense that it just recreates the thing in a new tone, but it takes off from it, selectively, this element, this element, this element, in order to identify this is a burlesque that B is making of A, but it takes off into the blue with all sorts of things. It introduces extraneous materials: it takes one little detail and puffs it up beyond its significance in the original. It leaves out much, but it constantly comes back, so to speak, to refresh itself to the original, and then takes off again. But in no sense [66] parallels the original.

Mr. Mitchell: I think those are all the questions I have, your Honor.

Cross Examination

Q. (By Mr. Selvin): Dr. Baxter, your television program is the one that is known as Shakespeare on TV? A. Yes.

(Testimony of Frank C. Baxter.)

Q. That is a Columbia Broadcasting System program? A. Yes.

Q. Which began about four months ago?

A. Yes. The protocol began about a year ago, however.

Q. But so far as actual telecasting was concerned it began about four months ago?

A. Yes, in the late summer.

Q. And has, if I heard correctly, last Saturday been renewed for another period of time or semester? A. Yes.

Q. That program has never been directly advertised, has it? By that I mean newspaper ads or twenty-four sheets, or billboards, things of that sort?

A. No. Some Christmas readings I did, however, were advertised. [67]

Q. I understand, but those came just recently?

A. That's right.

Q. The program has, as you indicated, exceeded your expectations. I think you meant by that that the size of your listening audience or viewing audience is larger than you thought it would be?

A. Yes.

Q. It has become, in fact, a quite popular program, hasn't it? A. I hope so, yes.

Q. Don't you agree with me that to a considerable extent that has been due to word of mouth advertising of the interest and merits and quality of the program? A. Yes, I think so.

Q. That is a serious program, serious in the

(Testimony of Frank C. Baxter.)

sense that it deals with the subject of Shakespeare or Elizabethan literature? A. Yes.

Q. From a learned point of view?

A. Yes. But of course calculated to a popular audience.

Q. And calculated for an audience of the sort that in part, at least, might be listening to the program for the sake of the college credit that can be attained from it? A. Yes. [68]

Q. So it is aimed at the type of education and intellectual status, let us say, that you would expect to find in your average university English class?

A. Yes. Not altogether so, of course. This is a one-unit experience, one hour a week, and hence it has to be rather popular in its appeal. It opens more doors than it closes.

The Court: What is its name?

The Witness: Shakespeare on TV.

Q. (By Mr. Selvin): Leaving aside the occasional flashes or snatches of humor or levity, however, it is intended to be a serious discussion of literature, and particularly the literature, English literature as exemplified by Shakespeare?

A. Yes, I think so.

Q. And of course in order that the program might have its fullest effect on its listening or viewing audience it is essential, is it not, that it be received with the same seriousness of attitude?

A. Yes, to such degree as it is serious. Serious is a rather portentous word here. Certainly it isn't solemness.

(Testimony of Frank C. Baxter.)

The Court: It is not a comic program?

The Witness: No, that is right.

Q. (By Mr. Selvin): The art of parody or burlesque—let me rephrase that. Let me say that the custom of or practice of burlesquing or parodying serious works over [69] the ages is not one that has gone unchallenged, is it?

A. Do you mean legally challenged?

Q. No. I mean——

A. One thinks of Dr. Johnson in the eighteenth century refusing to let Foote burlesque him, but that was the personal sort of thing which I cannot feel to be the province of burlesque.

Q. Hasn't there in each period during which burlesque has flourished, hasn't there been a body of opinion among literary men in opposition to the practice of burlesquing serious works?

A. Never an organized opposition. If I may expand that a little bit, I would like to say this: that the philosophers of the comic agree on very few things. One thing is this, that wherever men are deeply and emotionally concerned they don't laugh. When people are deeply and emotionally concerned. And there are people, of course, whom the gods have created incapable of laughing at anything. And at every age I grant you there are rather solemn and portentous people that don't like laughter. But as for an organized school in any age, I don't know of any such thing.

Q. Whether there has been an organized school or an organization or body that has been opposed

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to the practice of parody or burlesque as such, have there not in each age been, let's say, prominent or eminent individuals in the [70] literary field who have opposed the practice of burlesquing or parodying serious works as a matter of principle, not as a matter of law?

A. No, I am sorry, I don't know of any such.

Q. Have you ever heard of Voltaire's opposition to parody or burlesquing of works?

A. Yes, you are very right, Voltaire did object.

Q. Or Lamont?

A. Lamont I don't know of.

Q. Or Wordsworth?

A. Again Wordsworth, you have to understand him, that he was a desperate man fighting desperately, emotionally concerned with everything, and hence did not—he was not a very good laugher, and he is one of the men, of course, that, alas,—to whom burlesque turns inevitably. But he represents a minority.

Q. How about Arnold?

A. Again, Arnold was somewhat a solemn, dogmatic, pontificating man who laughed with that unfortunate sort of laugh that can be turned on and off like a spigot. There were many things that weren't funny to him. These were exceptions to the very great tide of laughter.

Q. Browaing?

A. Browning accepted some of the laughter. I grant you that some of things he found annoying,

(Testimony of Frank C. Baxter.)

but he enjoyed, [71] for instance, Swinburne's parody of everyone else.

Q. Was that one in which Swinburne parodied himself?

A. Yes, yes; and Swinburne parodied seven different people, including Browning. Browning, I grant you, didn't like that, but he rather liked the others.

Q. Have you ever read directly or indirectly of H. M. Paul's opposition to the custom of parodying or burlesquing serious works? A. No.

Q. Or that of J. C. Squire?

A. J. C. Squire wrote at least four volumes of parodies himself and was a famous parodist. I can't imagine anything but an essay in paradox from him on this point. I knew Sir John Squire and he was a parodist on the London Punch for many long years.

Q. These gentlemen whom you disposed of as being not of the laughing sort, did their aversion to laughter extend to comedy or humor which was not of the burlesque or parody type, also?

A. I don't think Wordsworth was ever a very good laugher. Voltaire, on the other hand, was a man of passion, and of course he would deplore burlesque but love satire, and of course his satires are among the most corrosive ever seen. Candide for instance strikes at the very roots of human existence, philosophic satire. [72]

Q. Regardless of the psychological impulses which may have driven these men, or men like them,

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to their opposition, was not one of their specific reasons for their opposition to parody or burlesque that it tends to minimize the value, and I am not speaking of commercial or economic value, the value of the original, to use the phrase that I picked up in one of the books on the subject, that it takes the bloom off the original?

A. I have no doubt that one might find in letters and memoirs and table talk such statements, but, however, it seems to me you must test this against the larger human experience. I, for instance, could see the film Gas Light in ten minutes and be utterly wrapped up in it. I cannot feel that the bloom has been taken off, because some mountebank has made fun of it.

Q. That of course is a purely subjective reaction? A. Yes, sir.

Q. Do you think it at all possible that someone who saw the Benny burlesque of Gas Light version might not be affected by the ludicrousness of that burlesque in his attempt to view Gas Light seriously?

A. I myself in my experience with the comic find these things often whet curiosity to drive people to the original. It seems to me that it is so different in tone, so utterly remote from the concerns of Gas Light as really to have very [73] little to do with it.

Q. There is such a thing, is there not, Doctor, that the psychologists speak of as an association of ideas? A. Yes, indeed.

(Testimony of Frank C. Baxter.)

Q. Is it not conceivable that in the course of viewing a serious portion of, say, Gas Light, or, say, any other serious work, that the memory of a ludicrous burlesque of that particular part might come to the viewer, thereby spoiling his reception of the serious work?

A. I concede that intellectually it might be so. I guess there is no one in this room who has seen as many burlesques of Hamlet as I have, it is my business, and yet soon I shall begin reading Hamlet for about the thousandth time, and all that will fall away. That is out here in the realm of escape.

The Court: Let me ask a question. May I interrupt, Mr. Selvin?

Mr. Selvin: Yes, surely.

The Court: I don't know whether it adds anything, but have you made any study at all of the composition of the TV audience?

The Witness: Good heavens yes. Only in a random way, in that we have had ten thousand letters now.

The Court: I mean the make-up, a cross-section of the TV audience; for example, what percentage of the TV audience [74] could watch a TV show with a background and training and experience comparable to yours? It would be very small, would it not?

The Witness: I would think so, because I have worked very long at this, that is true.

The Court: Probably one per cent?

The Witness: Perhaps so.

(Testimony of Frank C. Baxter.)

The Court: All right.

The Witness: Though, of course, it might be argued, sir, in my case being interested in the theory of these things I should make stronger cross-associations than another man who would if there is association of ideas there, also, because of his belief in the compartmentalization of ideas, what you do over here laughing need not spoil what you do over here when you are serious. It is true escape is a reality in literature.

Q. (By Mr. Selvin): Hasn't it been true in the history of criticism generally, not simply criticism by way of parody or burlesque, but hasn't it been true generally in the history of criticism that one of the most effective weapons is that of ridicule, in other words, making people laugh about something that others are presenting as serious?

A. Yes, I think that is very true, to make them laugh about something. Burlesque, however, doesn't do it that way. It doesn't say, "Look here at this weakness, look at [75] this absurdity." That is the realm of ridicule by which we mean something very like satire, the calling forth of the laughable in this. But it seems to me burlesque is a take-off, it gets away from the original. This is its reason for being the original, it gets out here and creates something quite new. I think the fun in Auto Light is quite independent of anything in that which it is ostensibly burlesquing.

Q. You think, then, that there would be no serious risk that a viewer of Gas Light, for instance,

(Testimony of Frank C. Baxter.)

in the scene where in the carrying out of his plot the principal character calls upon the servants to swear that they have not been responsible for the disappearance of the pictures, that in viewing that scene the appreciation of that scene for a serious viewer might not be spoiled by a recollection of the ludicrous situation of a butler coming in on his hands, walking in on his hands carrying a tray of drinks during the course of it?

A. I can't speak for the generality of mankind, but it seems to me that we do, curiously, compartmentalize these things. As I say, I can see another burlesque of Hamlet tomorrow, and see Hamlet the next day, and while I might for a flickering moment be reminded of that I can't conceive that for myself it would be spoiled.

Q. Have you made any special studies or investigations [76] in preparation for your testimony today?

A. For many years I have had a course in the history——

Q. No, I don't mean your general background, which I think is in the record, but have you made any special research or investigation for the purpose of collating the material which you were to use in your testimony?

A. Yes, I tried to look over the field and read everything available.

Q. Can you tell me what you read in that connection?

A. Yes, I went through the standard histories of

(Testimony of Frank C. Baxter.)

English drama, I looked at old John Genest, 1832, ten volumes; I looked at Walker's history of English satire and satirists; I looked at these books that I know very well, anyway, Kitchin's Burlesque and Parody in English Literature; I went back and read Bret Harte; I looked up the complete volume of parodies and burlesques of Sherlock Holmes; I have read miscellaneously but following all the leads that opened up.

Q. In the course of your reading of Kitchin did you also read the introduction?

A. Yes, sir.

Q. That, incidentally, is Kitchin, A Survey of Burlesque and Parody in English, published in 1931 by Oliver & Boyd of London, Edinburgh and London? A. Yes. [77]

Q. And the Kitchin is George Kitchin who is lecturer in English at the University of Edinburgh?

A. Yes.

Q. And holds master's and doctor's degrees from Edinburgh, and baccalaureus from Oxford?

A. Yes.

Q. Do you recall in the course of that introduction, page 17, that is xvii——

A. No, I do not.

Q. ——Kitchin saying the following quote, and then quote within a quote: " 'Parody will only strike at what is degrading and false' said an eighteenth century authority on the subject, but everyone can remember cases where parody used with clever prejudice has really injured us for the enjoyment of

(Testimony of Frank C. Baxter.)

good work. This matter has been closely argued at various times both here and in France." Then he goes on on that theme. Would you say that is a fair statement on the situation?

A. I feel he is using parody—remember, this man is not dealing with a great deal of burlesque and parody, he rules out all the drama, for instance, and he is looking—and he has a warp this way in that he is interested in the eighteenth century sort of satire; he is looking at that satire which seeks to slay, the school of Pope, the malignant little men, the twisted Byron, and he is concerned with that sort [78] of thing much more than he is with this freer and happier burlesque that you meet otherwise.

I grant you that when Dorothy Parker says what she says about Katherine Hepburn, you never think of Katherine Hepburn but what you think of this other. That is a malignancy. That is the sort of thing I don't meet in burlesque. Certainly no focus in Auto Light that would say, here he is making this man squirm or making cheap and degrading this nobility.

My point is this book studies satire primarily, and he is interested in that. That is what I can't see in the pure burlesque such as Auto Light.

Q. I am not going to devote very much time to it, because it is largely collateral, I assume, but simply to complete the record as to whether he studied satire or burlesque, and as to how far he goes, his table of contents indicates:

(Testimony of Frank C. Baxter.)

Chapter I, Medieval Burlesque;

Chapter II, Elizabethan and Dramatic Burlesque;

Chapter III, Jacobean and Later Seventeenth Century Parody and Burlesque;

Chapter IV, Eighteenth Century Verse Parody;

Chapter V, Burlesque of Eighteenth Century Lyric Kinds, and The Rolliad;

Chapter VI, Early Prose Parody and Burlesque;

Chapter VII, The Anti-Jacobin-Political and Social Parody;

Chapter VIII, Parody of The Early Romantic Poets;

Chapter IX, Modern Prose Parody—Jane Austen to Bret Harte;

Chapter X, Verse Parody From Bon Gautier to Heptalogia;

Verse Parody of Today, having regard to the fact that the book was published in 1931. That is Chapter XI.

Chapter XII, Burlesque of The Esthetes, and Prose Parody of Today.

A. May I comment on the table of contents? That you will notice he does not stress burlesque very much. His interest is in the rather corrosive political and social satire.

Q. That, I suppose, can speak for itself. But practically every chapter heading mentions burlesque.

A. He doesn't have theatrical burlesque.

Q. Which parodied works and their parodies or

(Testimony of **Frank C. Baxter.**)

burlesques did you read in preparation for your testimony here today?

A. Stephen Leacock, Bret Harte.

Q. Which?

A. Bret Harte's parodies; Thackeray's parodies.

Q. Let's take Bret Harte. What of his did you read?

A. Miss Mix, for instance. Miss Mix it is called.

Q. And that is a parody or burlesque of what?

A. Charlotte Bronte's Jane Eyre.

Q. Is that poetry, prose, or drama?

A. It is prose, as its original is prose.

Q. What others did you read?

A. Sherlock Holmes, which is called Hemlock Jones.

Q. By whom?

A. By Conan Doyle, Sir Arthur Conan Doyle.

Q. I mean Hemlock Jones is by whom?

A. Bret Harte, 1899.

Q. That, again, is prose? A. That is prose.

Q. Which of the Doyle works does that parody?

A. The Sherlock Holmes stories.

Q. Which? The Study in Scarlet, Sign of The Four, and The Hound of The Baskervilles, or one or more of the short stories?

A. It does what the parodist and the burlesque writer often does. That is, he goes to the important things that make a work significant. Now, in this house there are many mansions, and one way of burlesquing is to burlesque style, if style be the important thing. For instance, we have seen these

(Testimony of Frank C. Baxter.)

burlesques recently of Dragnet. Now, no one can remember what happens in a Dragnet story ten days later, but you remember the two men, the underplaying, the people [81] trying to do their duty against difficulty. So the burlesquer turns to that.

Q. So Hemlock Jones is a burlesque of the Doyle style?

A. The Doyle character with all of his eccentricities, and his fawning, sycophantic Dr. Watson, who begins by licking his shoe.

Q. But it does not imitate even in the comic vein any particular incident or series of incidents in the Holmes stories?

A. No. On the other hand, Miss Mix does. That is a very interesting section-by-section parody of Charlotte Bronte's Jane Eyre.

Q. What others did you read in preparation for your testimony?

A. I read Donald Ogden Stewart's Parody Outline of History. Again that is a little different sort of thing from the regular theatrical burlesque, in that he imitates the important things about the style of a dozen or perhaps more, ten, modern writers.

Q. You also referred in the course of your direct testimony to the location in Allardyce Nicoll of some of these, at least the impression I got from your testimony, of these many dramatic burlesques; can you point out a place in the work, which I now put before you, consisting of two volumes of text

(Testimony of Frank C. Baxter.)

and two volumes of index to which you [82] were referring?

A. What is the question specifically?

Q. I thought you said this morning, in response to a question, that various of these dramatic burlesques of which you made mention could be found in Allardyce Nicoll's work.

A. Yes. Will you come here a moment, and I will show you what I did. You will notice in this check-list, which has been done over many years, you have burlesques here, The Golden Ring; what I did was go in the general index of the book and trace that down and see what that was. If it was in the text somewhere, I mentioned it here. If not, if it was a burlesque on something, the source of which I could not be sure, I did not mention it in my list. But you know this is a catalogue raisonne. It gives you burlesque. The Young Recruit——

Q. What you are referring to is what is published in this set, it happens to be Volume 2, but Volume 1 is the same, is it not?

A. That's right, and many of these references lead you back to Volume 1.

Q. Which is called a hand list of plays. And what that purports to be, is it not, is a list of nearly complete, or as complete as Mr. Nicoll could make it for the given period in the case of this volume, 1850 to 1900, of the plays that have been performed on the, I suppose, English-speaking [83] stage during that period? A. Yes.

Q. Is that right? A. Yes.

(Testimony of Frank C. Baxter.)

Q. Then opposite the title of each play he has a letter or series of letters, a symbol or key, which he explains as indicating the type of play that it is, and in those cases where he classifies the play as a burlesque he puts as the key the abbreviation Bsq.?

A. That's right.

Q. Now, you have taken those instances in which that key appears and then have traced them back to see if it appears in the text of this work?

A. Yes, or if I could get any other lead elsewhere on it.

Q. I think I am reasonably familiar with the sequence of the alphabet, but I could have made a mistake; can you find The Hunchback of Notre Dame in there? A. Yes, I will try to.

Q. At least I couldn't find it under name of author. I didn't have time to look for it under Title.

A. See, I may have got that from some other book, but I think it is here. Here is the Hump Back. You met that, of course. Let's see whether it is in this other volume. Is there a name index?

Q. That is one of the things that baffled me. If you recall in the old days the American Mercury Book Review, I would say this: The work sadly lacks an index.

A. Yes, that is true. One has to get at these things in half a dozen different ways and certainly there is the one I referred to, The Hump Back, two burlesques, one at the Edinburgh and one at the Strand.

(Testimony of Frank C. Baxter.)

Let me see what in my notes the secondary title of that was. Sometimes it is the secondary title.

Q. See if you don't agree with me, Doctor. So far as the table of contents is concerned, the only portion of this work, which is, incidentally, a work on nineteenth century drama, generally, it is not confined to burlesque or parody?

A. No, it is the general check-list of plays given in that time.

Q. The only section which seems to refer to burlesques would be Section 4 of Chapter III?

A. Very often these things, being minor, are in the footnotes, and you have the footnote reference.

Q. The statement that I just made is true, is it not?

A. For instance, here you have a burlesque Esmeralda, and the date is right, Sir Gayety Theatre, '79, Esmeralda; here is a comedy, Esmeralda; but if you chase it back using Odell's Annals of the English Stage—of the New York Stage, there are all sorts of check-lists to which you have to go. [85] This is the Esmeralda of the Hunchback of Notre Dame. I have no doubt that The Hunchback is buried in there as the second title of something with another main title, and I could find it in there under a footnote dealing with the Hump Back if you let me look for it.

Q. Anyway, with regard to these various burlesques that you read in preparation for your testimony, did your investigation extend to ascertaining with respect to the original, or model, or the work

(Testimony of Frank C. Baxter.)

which was being burlesqued or parodied, whether that work was one which was protected by any copyright law, or whether it was in the public domain at the time of the appearance of the burlesque? A. No, I did not.

Q. And did you carry on your investigation to determine what, if anything, had been taken from the original work in the burlesque or parody?

A. Wherever I could get the actual text, yes, oh, yes.

Q. In what instances did you get the actual text?

A. Quite notably the book there before you on the table, where obviously a text is just paraphrased in a comic vein from one end to the other.

Q. Then, having made that much of an analysis did you carry your researches on to ascertain whether or not the parody or burlesque was issued with the permission of the author of the original?

A. No, no.

Q. I think you said on direct examination that you never heard of any examples of requesting or obtaining permission to parody or burlesque one's work. Do you think that upon prodding your memory of your reading a little bit further that you might not think of some such example?

A. No, I don't know of any, that is quite true.

Q. Did you ever hear of Charles Lamb asking DeQuincy for permission to burlesque his Advice to a Young Man, whose education had been neglected?

(Testimony of Frank C. Baxter.)

A. No, I did not. I should know that, for I know of Lamb's own burlesque of things.

Q. That is right, he did burlesque with usually an introductory preface apologizing for it.

A. Sometimes he did as a hoax, trying to pass off the burlesque as an original.

Q. But certainly you do not know, with respect to various burlesques that have been issued from time to time, that permission was not obtained?

A. No. It would surprise me as a student of literature that it would be asked, for this is a form of criticism, and one doesn't write to Mr. Hemingway and say, "May I criticize," in such and such a magazine, "your novel?"

Q. Is all burlesque a form of criticism?

A. I think all laughter is in the sense that it values—it [87] studies values.

Q. What is there about Gas Light that is criticized, using it now in the technical term, by Auto Light?

A. Just this: You have a world full of doom and pressure and menace, and in the sense in which I use criticism and laughter, Gas Light is here, and Auto Light says, "Let us step into a merrier world where these things won't hurt." In that sense it is choosing between values.

Q. Well, it is setting up an opposing or contrary value? A. Quite a different value.

Q. But it is not——

A. But equally desirable.

Q. But it is not a criticism of a work in which

(Testimony of Frank C. Baxter.)

we think of the ordinary dramatic or literary review as such? A. No, no, that is true.

Q. Further, in analyzing these various works, and having read them, analyzing them to the extent that you could find a text to see what had been taken one from the other, did you make investigation to discover whether the state of the law was such at the time that the burlesque appeared as to make the taking, whatever it might have been, lawful or unlawful?

A. No, I did not. Legal consideration, of course, is beyond my powers. All I know is in our own day one sees [88] this frequently, and that is during my lifetime. I have seen many, many such burlesques. I have only to assume that it is part of the great tradition.

Q. I gather the gist of what you have been saying here today is that parody or burlesque, as the case may be, is in itself a separate art form, is that right? A. Yes, I think so.

Q. And I suppose you mean that it is a separate art form in the same sense that, let us say, drama is a separate art form from a novel?

A. There are categories based upon tone, and categories based upon purpose, and categories based upon form. The difference between the novel and the drama seems to me rather a formal one; but burlesque is in the many-mansioned house of literature, something characterized by a difference in tone and in purpose, it seems to me.

Q. Isn't drama a separate art form from the

(Testimony of Frank C. Baxter.)

novel, at least to this extent, that generally speaking —of course, there are exceptions—generally speaking it requires a somewhat different kind of creative ability? A. Yes, of course.

Q. And that it does serve a somewhat different purpose in the main?

A. Save that if one takes a play like Winterset and makes a novel of it, one preserves the tone, takes the [89] characterization, takes the theme, I suppose, or vice versa, in taking a novel and reducing it to a play, you are in a sense just changing the key.

Q. Would you say that the business of translating one work into another language is at least in a sense a separate art form? It certainly requires a different skill?

A. Yes, because what you have here is Homer in Greek, now you have Homer in English, the two things, and it is the wistful hope of the translator that it will be so alike that the only difference will be the difference in the different tongues.

Q. But it takes a considerably different type of skill than that of creating the original, whatever the language may have been?

A. Yes. Of course, the tragedy of translation is it takes the original skill, plus the linguistic one, for no translation is good unless the translator has some of the virtues and abilities of the creator.

Q. Certainly music is a separate art form from that of a novel? A. Yes.

(Testimony of Frank C. Baxter.)

Q. And the musical play is a separate art form from that of the ordinary dramatic composition?

A. It is a different species within the genus, yes.

Q. Have you either generally in the course of your [90] study of literature or specifically in preparation for your testimony here made any study into the law protecting the rights of authors?

A. Oh, no, that is beyond my power.

Q. I don't mean any study from the technical standpoint, but from the standpoint of acquainting yourself in a general way with what the legal status of others and their works have been from time to time in the history of literature.

A. From time to time, yes. As of one state, California, in 1914, I don't know. But certainly through the ages this thing has existed side by side, with the prime creation has come the secondary art of burlesque and parody, and it seems to have been sanctioned by the generality of men.

The Court: I don't think that is what counsel means.

The Witness: I am sorry.

Mr. Selvin: No, it isn't.

The Court: Is it true, generally, that the protection given an author has period by period increased from a period when there was no protection at all to the present when there is considerable protection given an author?

The Witness: Undoubtedly. It is a matter of obvious fact that it has increased as time has gone on.

(Testimony of Frank C. Baxter.)

Q. (By Mr. Selvin): As a matter of fact, haven't you [91] noticed in your various studies and readings that at least until the time of the introduction of printing in the Western World that the law apparently was very little concerned with the rights of authors in their writings?

A. Yes. Of course the publication did not exist in our sense.

Q. And haven't you also observed—withdraw that, let me ask you specifically, I suppose you are aware of the fact that the first copyright statute, the first act of Parliament or other legislative assembly of which we know, which formally secured authors any rights in their works was enacted in England in 1710 in the Statute of 8 Anne, Chapter 19? You are aware of that?

A. From there on it was progressive, of course.

Q. Are you also aware that prior to the Statute of Anne, which I say was enacted in 1710—pardon me, the printing press was introduced in England in 1425 or about there?

A. No. Much later. 1475.

Q. 1475?

A. The first printing in England was 1476.

Q. Then prior to Anne, Statute of 8 Anne, and certainly after introduction of printing in England, there was a considerable period there where printing or publishing was a monopoly of the Stationers Company under patent from the [92] Crown, was it not?

A. Wait a minute. That isn't the way to say

(Testimony of Frank C. Baxter.)

that. Not a monopoly of publishing. To keep utter chaos from reigning the Stationers Company permitted a man to say, "I am going to put out a book called Homer, as translated by Joe Doakes." All right. He could put his shilling down and receive a certain stay, which for a limited time would permit him to print that book, that is true.

Q. But without the license of the Stationers Company, publication and printing of a book in England was a wrong which was remedial in the star chamber, was it not?

A. That is difficult to say. Only where certain issues arose. But it was very loosely controlled. If you want control, if you are looking for controls, I give you the licensing Act in the seventeenth century, which meant that everything had to be passed by the Bishop of London. I don't like that, either.

Q. It is not the question of what kind of law we like, but the question of what in your searches you discovered the law to have been at any particular time in history. In any event, with the Statute of 8 Anne, authors are formally given, for the first time, so far as we know, in at least English or American history, the exclusive right for a limited term to print, publish, and republish their works?

A. That's right. [93]

Q. The Statute of Anne, however, was limited to just that, however, printing, publishing, and republishing their works? By that I mean it did not give them any exclusive right of dramatization?

A. That I don't know.

(Testimony of Frank C. Baxter.)

Q. Or of translation?

A. That I don't know.

Q. Or of condensation or abridgment?

A. That I don't know.

Q. Or anything of that sort?

A. That I don't know.

Q. You do know the Statute of Anne was limited in the benefits which it sought to confer to subjects of the British king?

Mr. Mitchell: He is asking the witness for a legal conclusion.

Mr. Selvin: I am asking him for what he knew.

Mr. Mitchell: I object to it on that ground. This man is not a lawyer, nor qualified to give such an opinion.

Mr. Selvin: I don't expect——

The Court: If he doesn't know, he can state so. It is historical background rather than legal.

Mr. Selvin: That is all I am interested in. If the witness knows it. If he doesn't know——

The Witness: No, I don't know the details of that. [94]

Q. (By Mr. Selvin): It has been true, you have observed this much, I will make it short—instead of going through the whole history of the legislation in England and in this country, of which the court can take judicial notice, you have observed in your reading a constantly growing pressure, and a concomitant response to that pressure, to increase and broaden the rights of authors in their works?

A. Oh, yes. As the rewards of authorship have

(Testimony of Frank C. Baxter.)

grown, as new media have made it possible for extra rewards to come in, this is true in every aspect of life. I made the mistake at the television studio of picking up a table and moving it six inches to where it would be desirable, and found that I had run afoul of an increasing tautness in life; that you can't move that table unless you are an ordained table-mover.

Well, of course, authors have to be protected, there is so much now to protect. But——

Q. Again I am not asking you——

A. If you are going to extrapolate this curve and show us a time when people will not be able to laugh at each other, I resign my card in the human race.

Q. I don't know that we have come to that yet, and that is not what I am talking about, Doctor, as I hoped I had made myself clear, but perhaps I hadn't. A. Yes, forgive that.

Q. You have observed, however, that there have been [9] various times in the history of the development of English literature when various uses could be made of an author's work for which at the then time the author had no legal redress?

A. Oh, yes. Dickens, for instance, yes.

Q. The Dickens reference is of course to the parodying of his works in this country?

A. Oh, no. In his own country.

Q. There was a time both in England, with respect to foreign works, that would be foreign there, and in this country with respect to works that

(Testimony of Frank C. Baxter.)

would be foreign here, where there was no protection for the works of foreign authors, and they could be pirated at will; that is right, isn't it?

A. Yes.

Q. And as a matter of fact, it was in this country only a comparatively late date that the works of foreign authors could be protected here?

A. Yes.

Q. In any event, as various ways of utilizing an author's work developed or became frequent, there was the inevitable pressure, at least from the authors' side of the argument, to expand the law to protect him in the use of that right?

A. Yes.

Q. You have observed, have you not, in your reading, that for the present the culmination of that effort came in [96] England with the enactment of the Copyright Act of 1911, the Statute of 1 and 2 George V, and in this country with the Copyright Act of 1909? You have——

A. Yes, I realize the growing stringency of these things.

Q. Do you attach any significance to the fact, and this you will have to accept, the factual part of my question you will have to accept for the purposes of your answer, I represent to you that to the best of my knowledge it is true, do you attach any significance to the fact that it was not until after the 1909 Act was enacted in this country, and the 1911 Act was enacted in England, that there is any

(Testimony of Frank C. Baxter.)

discussion in the legal decisions relating to the very property law of the right to parody or burlesque?

A. I was not aware of that.

Again, in this house there are many mansions, and certainly to take a play, a serious play, and make a shorter serious play, which in a sense is competitive and parallel to it, would seem to me to be actionable, as a layman looking on.

Q. The statement that I make is subject to one exception, there is one decision with which counsel here are all familiar, which I think was decided in 1903 in this country. But beyond that I think the statement that I made in my question to you is correct. [97]

You have yourself, have you not, Dr. Baxter, tried your hand at parody or burlesque?

A. No.

Q. Do you recall——

A. Wait a minute: Yes, I did once.

Q. Do you recall a little thing called Alice's Adventures in the Library? A. Yes.

Q. Was that——

A. Yes, that begins as parody for a minute, and then goes into sheer burlesque, yes.

Q. Without asking you to pass a literary criticism—I realize that would be immodest—would you say that that is a fair example of the genre we are talking about?

A. Yes, I would. Very much.

Q. There you set out to have a little fun with

(Testimony of Frank C. Baxter.)

some of the things that can and do happen in a public library. Did you not? A. Yes.

Q. As a vehicle for your fun you took three characters from Alice in Wonderland, Alice, The Mad Hatter, and the White Rabbit?

A. That's right.

Q. You had Alice follow the White Rabbit into the Library where the Mad Hatter—— [98]

A. She fell down the well, which she does in the original.

Q. Landed in the Library, and then followed the White Rabbit? A. Yes.

Q. The White Rabbit is apparently some sort of assistant in the library, the Mad Hatter is the librarian, is that right? A. Approximately.

Q. And the fun that you had consisted of, among other things, having, as I recall it, having one of the characters, I believe the Mad Hatter, tell Alice that he had gotten lost on the eighth floor of stacks somewhere and has subsisted on a diet of books until he ran onto Hervey Allen's Anthony Adverse, which he found to be undigestible?

A. No. That is in the Ballad of the Lost Librarian, which he tells.

Q. You used the three characters from Lewis Carroll? A. Yes.

Q. And you attempted an imitation of his general style, but you did not take incidents or sequence of events, or even language from Alice in Wonderland, did you?

A. No; but because this was not ostensibly a

(Testimony of Frank C. Baxter.)

burlesque of Alice in Wonderland, but of literary tastes in the 1930s—when was it?—the literary tastes, the profession of the librarian who struggles against all sorts of odds. In fact, the fun was in what I stuffed it with, the other was a vehicle.

Q. You took off from Alice in Wonderland, but you carried out your own design, nevertheless leaving to Lewis Carroll that which he had himself created in the manner of incidents, events, and literary expression?

A. I hope he would think so.

Mr. Selvin: I think that is all.

Mr. Mitchell: I would like to offer in evidence, your Honor, since the witness spoke about these, and since they are examples of the type of burlesque that uses a great deal of the original, the original work, The Cradle of The Deep, by Joan Lowell, published by Simon & Schuster in 1929, and the burlesque of that work entitled Salt Water Taffy, by——

Mr. Selvin: Corey Ford.

Mr. Mitchell: By Corey Ford, published by G. P. Putnam's Sons in 1929.

Mr. Selvin: Before——

The Court: Let's mark The Cradle of The Deep as Exhibit 12——

Mr. Selvin: Your Honor, I want to interpose an objection.

The Clerk: 12 was in the stipulation.

The Court: Is there a 12 referred to?

(Testimony of Frank C. Baxter.)

Mr. Selvin: There may be a 12, but it doesn't have to be [100] marked 12.

The Court: Mark one of them No. 12, the Cradle of The Deep, for identification, and the other 13 for identification.

Mr. Selvin: I have no objection, simply because the witness referred to it in the course of his testimony. But if it is offered for its own sake, then I have the same objection to that as I have to paragraph 13 of the stipulation.

May I ask one question on that, since you reminded me of it, and since you are offering it?

Mr. Mitchell: All right.

Q. (By Mr. Selvin): Isn't it your recollection after the Joan Lowell book came out it was subsequently exposed as being completely a hoax?

A. Some time later.

Q. Joan Lowell had never been born or raised on a ship, and the work was completely a work of imagination?

A. It has to be judged as a novel, rather than autobiography.

Q. But when it was first issued it didn't purport to be, and was not accepted as a novel but as a biographical work? A. That is very true.

The Court: The objection will be overruled, and Exhibits 12 and 13 will be received in evidence. However, they will be received in evidence for a limited purpose. They are not received in evidence on the theory that because Salt Walter Taffy was a parody of The Cradle of The Deep, that therefore

(Testimony of Frank C. Baxter.)

in 1953 TV can be a parody of Gas Light. But they can be received for all other purposes. Is that satisfactory?

Mr. Mitchell: That is satisfactory.

The reason you exclude it is not the reason we offer it for at all.

The Court: Are you through?

Mr. Mitchell: Unless your Honor has other questions of Dr. Baxter.

The Court: No.

Thank you, Dr. Baxter. It has been very pleasant. I would like to take one of your courses in literature. It has been much more pleasant than listening to these lawyers argue about intricate legal problems.

The Witness: Thank you.

Mr. Selvin: I can vouch for the fact that if his actual courses are anything like his TV show it would be pleasant and stimulating.

The Court: What time does your TV show go on?

The Witness: Advertising. Saturday at 11:00.

The Court: No wonder I have never seen it. Thank you, Doctor. [102]

Mr. Mitchell, is there anything further?

Mr. Mitchell: Yes, I would like to have marked now as Exhibit 4-D the script, Ah, Wilderness, produced as part of a radio show on April 12, 1936; and as Exhibit 5-D the script of the motion picture——

The Clerk: That is a cutting continuity, isn't it?

Mr. Mitchell: The cutting continuity, yes, of the motion picture Ah, Wilderness, produced by Loew's Incorporated.

The Court: They will be so marked for identification, 4-D and 5-D.

(The exhibits referred to were marked Exhibits 4-D and 5-D, for identification.)

Mr. Mitchell: These, these four exhibits, -A, -B, -C, and -D, are examples of Loew's pictures that have been burlesqued, and are not intended necessarily to be examples of all burlesques of all pictures. We simply selected some of Loew's pictures.

The Court: Are all four of them Loew's pictures, 5-A, -B, -C, and -D, cutting continuities?

Mr. Mitchell: Yes.

I think everything in the stipulation of facts has now been admitted in evidence, except the exhibits 4, 5, 6, and 7, the subdivisions of 4 and 5, and paragraph 13.

Paragraph 13 we now offer in evidence as a part of the background of burlesque which we desire to bring to the [103] attention of the court. It sets forth burlesques which have been done by Jack Benny of various Loew's pictures, both on radio and on television, and the burlesques which have been done by Benny of various motion pictures produced by other producers of motion pictures, those burlesques being done on radio.

The Court: Let me read it before you make your objection, Mr. Selvin.

Mr. Selvin: Very well, your Honor.

(Slight delay in proceedings.)

The Court: All right, Mr. Selvin.

Mr. Selvin: With respect to paragraph 13, I would like to divide it, your Honor, because it relates to two similar but different matters.

First, so much of the paragraph as relates to Benny's version of Loew's motion picture, that is the part that begins at the beginning of the paragraph and ends at line 24 on page 14 of the stipulation, we object upon each of the grounds, incompetent, immaterial, irrelevant, no foundation laid to show that the part copied was substantial, copyrightable, or not in the public domain; and upon the further ground that the alleged custom or customary use or practice cannot narrow or restrict or destroy the rights conferred by the copyright statute.

With respect to the remaining portion of the paragraph [104] which relates to Benny versions of motion pictures produced by other companies——

The Court: Where is that break line?

Mr. Selvin: Line 23 of page 14.

The Court: All right.

Mr. Selvin: We object upon each of the grounds just specified in our objection to the first part of the paragraph, and upon the additional ground that that is entirely a matter which is res inter alios acta and has no bearing upon the rights of the parties to this litigation.

The Court: All right. The objection will be overruled, both objections, and paragraph 13 will be received in evidence. However, I receive it in evidence pursuant to the statement that I made to you

heretofore, that the court will sort what is proper from what is improper.

And so your mind will be at rest, certainly the fact that Mr. Benny has in the past made burlesques of motion pictures does not mean that we are foreclosed from deciding that issue in this case. There are other matters contained therein, though, which throws some little light.

At any rate, I will receive paragraph 13 in evidence.

Are you going to offer separately, now, the other exhibits?

Mr. Mitchell: Yes. We will now offer Exhibits 4-A, 4-B, 4-C and 4-D in evidence. [105]

Mr. Selvin: We make to those the same objection as we made to paragraph 13.

The Court: All right. It will be received in evidence, and the same comment of the court will apply. 4-A, 4-B, 4-C and 4-D in evidence.

(The exhibits referred to were received in evidence as Exhibits 4-A, 4-B, 4-C, and 4-D.)

Mr. Mitchell: We also offer 5-A, 5-B, 5-C, and 5-D in evidence.

Mr. Selvin: The same objection there.

The Court: The same ruling.

Mr. Mitchell: We also offer in evidence Exhibit 6, which is the 1945 radio program of the burlesque of Gas Light, which your Honor heard played in transcription form, and Exhibit 7, which is the script of that radio program.

Mr. Selvin: Our objection in that regard was stated earlier in the proceeding, I think at the time

that I was presenting the stipulation, and I repeat that objection now.

The Court: The objection will be overruled. Exhibits 6 and 7 will be received in evidence. Again, what the court said previously will apply, except that this presents a little different problem.

There has been pled here the defense of laches, or estoppel, or something. For the benefit of counsel on that, I don't consider that too important, I may change my [106] mind, as a tentative view. I can see where Loew's might stand by and permit a radio skit of a motion picture, and at the same time protest very vigorously on a TV picture. And since the problem is different, I don't think it is too important. For instance, if the plaintiffs—the defendants, rather, here were again wanting to do the radio version, then I think the contention made would be a pretty pat one, that no objection had been made previously and one more slice off a cut loaf wouldn't do any harm. But because I think there are different media involved here, there is not much to concern us in that problem.

If you have different views on it I will be glad to hear from you.

Is there anything further now in the way of evidence?

Mr. Mitchell: We rest.

Mr. Selvin: Your Honor, all we have, we would now like to offer by way of rebuttal, and in view of the introduction in evidence of Exhibits 4 and 5, we would like to offer, in order to complete the record, the positive prints of the four motion pic-

tures involved, being specifically Mutiny on The Bounty; Dr. Jekyl and Mr. Hyde; Edward, My Son, and Ah, Wilderness, subject to the same conditions with respect to production, custody, and what have you, as were made in respect to Exhibit 2.

Mr. Mitchell: We don't have to look at those motion [107] pictures, do we?

The Court: We will mark them in this order: We will give them No. 14, -A, -B, -C, and -D. 14-A will be the positive print of Mutiny on the Bounty; 14-B, Dr. Jekyl and Mr. Hyde; 14-C, Edward, My Son; and 14-D, Ah, Wilderness; and they will be received in evidence under the same understanding, that they may remain in the possession of the plaintiff but will be produced if required at any subsequent court hearing.

Mr. Selvin: That is all we have.

The Court: Before you rest the case, I have several matters of inquiry.

Again I don't want you to think that I have any definite view in this matter as yet. I try to test out thoughts that I have in the matter.

Is there anything in your stipulation of facts concerning the number of people who saw Gas Light, the number of times it was exhibited, the number of different theatres and localities in which it was exhibited?

Mr. Selvin: To a considerable extent yes, your Honor.

The Court: You have some financial figures in there. I haven't read it all yet.

Mr. Selvin: I think you will find the countries in which it has been exhibited and the estimated total number of persons who paid admission fees.

The Court: What page is this?

Mr. Selvin: Page 10. Page 10, the latter part, is the number of persons who paid admission fees, estimated, both domestic and foreign, just under 52,000,000. 24,786,000 domestic, which of course means this country, and foreign 27,000,000.

The Court: All right. Now——

Mr. Selvin: That, with a specification of the countries in which it has been exhibited I think is as much as there is along the lines asked about.

The Court: All right.

Is there anything in the stipulation that estimates the number of people that would see the television, 1953, TV—the proposed TV of Auto Light?

Mr. Mitchell: No, there isn't anything in the stipulation.

Mr. Selvin: There isn't anything beyond the general statement that Jack Benny, of course, is one of the ablest and most popular comedians in that media, or words to that effect. I don't know that that is the exact language.

The Court: Can you arrive at some stipulation about what the potential viewing audience of a showing of Jack Benny's TV picture would be?

Mr. Mitchell: I think we can. But we don't have the facts here to do it. But there are methods of ascertaining [109] approximately what Mr. Benny's audiences have been and probably will be.

Mr. Selvin: I am willing, in that regard—I think

I am familiar with the type of compilations to which Mr. Mitchell would go for that information, and I am willing that he may resort to them with the aid of such expert interpretive advice as CBS has available to him, and he may put the results in the form of a letter addressed to the court, with a copy to me, and so far as I am concerned, I will stipulate that that is an estimate of what he probably will get.

Mr. Mitchell: We will get an approximate estimate within thousands.

The Court: It will only be approximate, that is all I want. We will call that Exhibit 15, and reserve a number for it, and the clerk will mark it in evidence when it is received.

Mr. Mitchell: I think we can send it in as a joint letter, so that it will be in the form of a stipulation.

The Court: All right.

Mr. Selvin: Any way you want it.

The Clerk: You say it will be in the form of a stipulation?

Mr. Selvin: This is a stipulation.

Mr. Mitchell: Whatever way is most convenient to the [110] court. We can send it in as a formal stipulation.

The Court: It has been stipulated. If it is a million off it won't make any difference. It is an estimate. No one knows exactly. We know there is a big TV audience, and I am interested in that problem.

Did you gentlemen want to discuss or argue this

matter some at this time, or do you want me to ask a few questions?

What are your desires?

Mr. Mitchell: Well, we would desire to have an opportunity to file an answering brief of some sort at least.

Mr. Selvin: I really have no preference, your Honor. Whichever will be the most expeditious and potentially enlightening method of disposing of the matter would be satisfactory to me.

I am willing and fairly well prepared, I think, to argue it orally now, or to submit our reply briefs and then argue it afterwards, if the court desires, or any other way.

The Court: Well, let me ask a few questions, and then I will let you file additional briefs if you want to, and then if we get to the place of wanting oral argument on it, I will inform you.

First, this is sort of hit and miss; Mr. Selvin, in your brief you have a point that you labeled the matter of implied consent. It makes a mighty good heading, and it is at about 17, entitled, "Fair Use Is Based on Implied Consent and the [111] Absence of Any Tendency to Supplant or Compete With the Appropriated Work."

Obviously I haven't read all the cases which you cite on that point, but from what I have seen are there any of those cases that discuss expressly this matter of implied consent, or is that your conclusion from looking over the cases and sort of coming to a group conclusion?

Mr. Selvin: No. There is, for instance, the Holt

case, which is quoted in part on page 19, where the court goes on to say—I don't know that it is particularly extended discussion: "In such cases"—— And speaking of fair use cases, "the law implies the consent of the copyright owner to a fair use of his publication for the advancement of the science or art."

The Court: What page are you reading from?

Mr. Selvin: Page 19 of our trial brief.

What I was reading from actually was a quotation from the case of Henry Holt & Co. vs. Liggett & Myers Tobacco Co.

Your Honor will recall that was a case where Liggett & Myers Tobac Company—in this case Chesterfields, rather than Lucky Strike—took three sentences out of a medical treatise and used it in an advertisement for a cigarette, and it was defended on the ground that it was a fair use, and in any [112] event an unsubstantial part of the treatise. And in that case the court expressly referred to the matter of consent.

There are, I am quite sure, others in which the rationalization of implied consent is to be found in the opinion, although by and large I think it is fair to say that it is just that, it is a rationalization of a result or reasoning on which the cases proceed.

The Court: I am glad you called my attention to that. The part that you refer to appeared at the bottom part of the page, and I didn't run on to it.

All right. Another question: There seems to be generally the growing tendency to protect the author in his rights. Certainly starting from an

historical background, the various Acts down to the present we see that tendency. Now, query: Judge Mathes some time back rendered a decision, I don't have the name of the case now, but it was a case involving the right of an author to the character that he created.

Mr. Loring: Sam Spade, Warner Bros. vs. CBS.

The Court: The Sam Spade character. In this action one of the plaintiffs is Patrick Hamilton, who is the author. His rights might well be different than the rights that Loew's have. If you followed the rationale of Judge Mathes' case, which I haven't read recently, but it seemed to me that he took [113] the position that the author creating a character reserved to himself the right to make further use of that character, and that when he contracted to sell the story to a studio, the studio had a right to use that character in the particular setting of the story, but did not acquire the right to use that character thereafter in other stories. Query: Are the rights of the plaintiffs, Patrick Hamilton and Loew's Incorporated, possibly different? The first query is does that rule have any application in this case? And if it does have any application, are the rights of the two plaintiffs, Hamilton and Loew's Incorporated, different?

Does anybody want to venture a shot at that?

Mr. Mitchell: This character business introduces, as Mr. Selvin well knows, an element which we don't have to meet here.

There is a serious question, Judge Carter, whether a character is copyrightable at all. Probably not,

as Judge Learned Hand has said, except perhaps in very extraordinary instances where the character is so imaginative and so clearly defined, as I believe he used the example Falstaff, as to perhaps be the subject-matter of copyright. But ordinarily characters are people, and in the world of literary property, if we are going to have any literary property, we have to preserve a field or series of fields of things that are not owned by anyone, and that everybody is free to use. [114] In that sense we are not expanding, I hope, the monopoly of authors so that they can close in and stop legitimate literary effort. So we have quarrels, Mr. Selvin and I, on those occasions, usually being—always being on the same side—with authors who attempt to close in on these common fields that can be used.

Now, characters is one of those things. And I think, as I recall it, that Judge Mathes said that he was not holding that characters were copyrightable. I may be wrong, but I think so. At any rate, there has been no case, I think, as yet, in which a character has been held to be copyrightable. So along with a lot of things you have characters free to be used by everybody.

The boy-meets-girl characters, nobody owns them, everybody can use them. And that question is, fortunately, not involved in this case, because that would be something else that would be brand new to decide.

The Court: It may not be involved because of the fact that the build-up of the character in the TV picture is not necessarily a duplication of the

character in the film, and likewise it is not such an unusual character as would be represented by Sam Spade, or the Lone Ranger, or some different characters that you might think of. But what goes through my mind is this, and looking at it purely as a matter of logic: Studios are entitled to be protected, broadcasting [115] companies are entitled to be protected, and so is the struggling author. The whole history of this matter of protection is one of a sad background. Take the progress made in Tin Pan Alley to where today the writer of songs can be assured something for his labors, and compare it with Stephen Foster and what happened to him with his great musical works. But isn't the writer himself entitled to protection? So, for example, if a writer creates a character, a character that stands out, to whom he gives a name—the name, probably, plus some of the physical characteristics and mental characteristics of the individual thereby identify him—and then he sells a story with that character in it to a studio or broadcasting company, as a matter of logic it doesn't seem to me that the studio or the broadcasting company can thereafter say that, "We have a right to write our own plays now with this character in it."

They may get somebody else with a different name that looks and sounds something like this fellow. But let's take the real case of taking the same name and the same character and then saying, "Because we bought your one story we are now going to make as many Sam Spade pictures or Joe Doakes pictures, or stories, as we want to": and it

seems to me there is a lot to be said on the matter of logic for the right of the author to in some way be protected in this character that he creates from exact copying. Query [116] whether it is involved in this case, because of the characterization of the husband in the film and the characterization in the motion picture. What called my attention to it is we see the poor author's name—I don't know the author and whether he is poor or otherwise, but so far nothing has been said about the author, everybody has been talking about the rights of the studio and the rights of the motion picture company.

Mr. Selvin: Let me clear that up to a little extent, anyway, your Honor. Loew's obtained from Patrick Hamilton the exclusive and perpetual—perpetual meaning, of course, for the life of Hamilton's copyright—motion picture rights in and to his play Gas Light. We have the right not only to make his play into one motion picture, but into remakes, reissues, anything that we want. But, however, it is just that play. We did that, prepared a motion picture which under the copyright act then becomes a work of which we, Loew's, are the author, and which we are entitled to copyright as a photoplay, and which was copyrighted as a photoplay.

Our contract with Hamilton authorizes, and incidentally he was notified before it was done and at least has not objected, authorizes us to join him as a plaintiff in any action arising out of our copyrighted motion picture or our use of his play in circumstances where necessary to protect [117] our interest. He was joined as a plaintiff, then, pur-

suant to that provision, and as I say, he was notified of the fact that we proposed to do it, and he can be taken to having consented to it.

He was joined for this reason, as far as we are concerned, and for this reason only: while as the copyright proprietor of the picture we are the copyright proprietor of the copyright which is in suit here, I thought perhaps the contention might be made that to the extent that that picture contained material taken from the play of Hamilton's, and of course it contains practically nothing else but material taken from the play of Hamilton's, it might be contended that we were nothing but a licensee of a portion of his copyright and therefore not entitled to maintain the action. And that is the reason for the provision in the contract, and we took advantage of it in order to have before the court the complete right in the literary material one way or another.

The Court: I take it you would be very unhappy if ultimately the court decided that the plaintiff Patrick Hamilton was entitled to an injunction and Loew's Incorporated was not?

Mr. Selvin: I wouldn't say I would be very unhappy. It would accomplish the practical result which Loew's seeks to accomplish, and certainly while it might make the procedure of policing photoplay copyrights a little circuitous, I [118] think most companies are in the position of having—as we have—the permission of the author of the basic literary material in connection with situations of this sort.

The Court: Is there any need, do you think, either one of you, to have this contract in evidence, or can we accept Mr. Selvin's statement as part of the record on that matter?

Mr. Mitchell: I don't see why there is. This is an action for infringement of the Loew's copyright, not for an infringement of Hamilton's copyright.

Mr. Selvin: The contention which I thought might be made has not been made. Had I been certain that it was not going to be made in the beginning, we never would have needed to avail ourselves of the right to join Mr. Hamilton as a party plaintiff. However, he is a party plaintiff and his rights, whatever they may be, are involved.

Although I must say that to this extent perhaps I am hurting myself, your Honor, I have always considered this as an action for infringement of the Loew's copyright in the photoplay, and not for infringement of Hamilton's copyright either in England or in this country of the play.

Mr. Mitchell: The action is not so framed.

Mr. Selvin: That is right.

The Court: Both parties concede, then, this is an action for an alleged violation of the Loew's copyright?

Mr. Selvin: That's right. [119]

Mr. Mitchell: That is what the complaint says, your Honor.

Mr. Selvin: That is all we intended it to be, although this other material is in there for the reason that I have indicated.

I might say, if it makes any difference, our con-

tract giving us perpetual motion picture rights included motion picture rights by every means, including television, our contract with Hamilton.

The Court: I had one other question now, but I have lost it. I think those are all the questions I have.

Mr. Mitchell: I think the kind of an answer that would be helpful to the court, or reply by way of brief, would be much more intelligible and better designed to accomplish its purpose if we did it carefully and not just speak off the cuff. For that reason we would like to have about 20 days in which to get such a brief in to you. Then if you want to ask more questions we would be glad to come up and answer them.

The Court: That is satisfactory, 20 days. Whose turn would it be first?

Mr. Selvin: We could have simultaneous briefs in the beginning. And I assume our replies—I don't care whether they are simultaneous.

Mr. Mitchell: The only problem is if you start in by [120] filing a brief, we reply, and then you reply to that, it runs into a considerable length of time here, which is a problem.

Mr. Selvin: As far as I am concerned I am willing to file simultaneous reply briefs. I know their position now, and they know ours, our affirmative positions and reply.

Mr. Mitchell: That is satisfactory.

The Court: All right. Twenty days for that purpose, simultaneous reply briefs to be filed.

The Clerk: Your Honor, you said 20 days for the reply brief. How about the opening brief?

The Court: There is just one more brief from each side to come in, and they are going to file them simultaneously.

Mr. Mitchell: You never had such a friendly lawsuit here, Mr. Clerk, that is the trouble.

The Court: To assist me in my thinking on this matter, let me just make one or two comments. I don't think there is any dispute of the right of criticism by a critic, and I doubt if the cases on criticism assist us very far along this route. The right to criticize in the sense of writing a critical piece on a play, whether it be laudatory or derogatory, I don't think is involved. Nor do I think that the parody of a small portion, or the burlesque of a small portion of some literary work would be seriously argued, even by the plaintiff, to be a violation of the copyright.

I think if the plaintiff has a case it comes down to [121] this, that the essential story, sequence, development of the plot and the climax have been taken lock, stock and barrel from the plaintiff's Gas Light.

If this did not involve a matter of burlesque, and if Jack Benny was putting out a picture other than burlesque, that was as close to Loew's Gas Light as this, I don't think anybody would argue but what there had been an infringement, because of the sequence of events, the build-up of plot, and the climax and so forth. So to my mind, at least tentatively, it comes down to a question like this: Assum-

ing that a person may take a small part of a picture and burlesque it, make a parody on it, can CBS or Jack Benny, or anyone else, take the essential story of Gas Light and then merely burlesque, as it were, the entire matter in a condensed form and say, "We may do so whether the owner of that copyright wants us to do it or not"?

And, again, we have to view the problem in the twentieth century and not in the eighteen-hundreds. This isn't a case of a couple of small theatres in London in the year 1825. This is a case where an immense amount of money has been spent in the development of, producing, and exhibiting industry of motion pictures, and here has come a competing medium of TV, which enables the TV exhibitor for a small amount of money to make a picture which will be shown to a large number of people, without the expense of providing the houses for [122] exhibition. The viewer furnishes his own TV set. You have a problem that has got to be viewed in twentieth century realities and not in the past of the eighteen-hundreds.

You have a problem, also, that when this goes up on appeal and it is finally decided by wiser men than I am, whatever court it finally lands in, it may well set a precedent that will seriously affect the TV industry and the motion picture industry.

Those are some of the thoughts that are going through my mind.

Another thought is this: I have read your briefs and have looked at some of the cases, and I understand that a criticism of a play is not actionable.

even if that criticism destroys the value of a play. In other words, a critic may write a bad piece about a play and the play is dead. If he is a good critic and is well-known, he may write a good piece and the play is made.

I understand that is not actionable.

The cases, some of them, seem to indicate that the question is whether or not the putting on of the burlesque or the parody destroys the economic value of the original. Other than on the basis that I have just indicated, would people be less apt to go and see Gas Light if they saw the parody or the burlesque?

Mr. Selvin was hitting at it with his questions of [123] destroying the bloom of the picture.

That brings you down to the question of the type of audience that sees a TV picture. When you deal with the theatre in 1850, you had a group of people that probably saw every show that came to London, and they would see whatever went on at both the theatres. And before the advent of TV you had a certain percentage or group of people who could be expected to see plays, a far greater percentage who could be expected to see motion pictures. Now you have TV, where there is no selectivity at all. Somebody turns a knob and they see a picture. Query: Are there persons—first of all, I don't want to depreciate the average American, because the average American is a very fine and great individual, but aren't there a lot of Americans, a lot of people who look at TV who would hear what was said about this being a burlesque or parody of M-G-M's

great classic Gas Light, who wouldn't even know what you are talking about, and who would spend 15 minutes watching Auto Light and think in their own minds that they had probably seen Gas Light, and who six months later when Gas Light was shown, say "Well, there is no use for me to see Gas Light, I saw a 15-minute version of it on TV and it doesn't interest me, I would rather go and see some other kind of a motion picture"?

These are the thoughts that are going through my mind on the basis of having seen these pictures and having read [124] your briefs.

Under the law cited by the defendants, plaintiff would not be entitled to injunction unless you could spell out that effect on the potential audience for future showings of Gas Light, as I read your authorities.

On plaintiff's side, if plaintiff can establish his implied consent theory it makes a lot of sense in what has gone on. We know that in certain cases, as shown by that paragraph 13, consent was asked to burlesque certain pictures; we know in certain cases consent was given because the star who was under contract with the studio was going to be used in the radio production. All of those things fall into place.

If you can spell out an implied consent theory, then all you say is that ordinarily consent is implied because burlesque advertises the product.

But when the lone individual comes along and says, "I do not consent," then your implied consent

of course cannot prevail over the express refusal of consent.

That is the reason I questioned Mr. Selvin whether he thought that any of his cases were directly in point on the implied consent problem.

Finally, of course, there is the problem that art and art forms should be free.

I was impressed by the witness' statement that it was [125] in the countries with democratic traditions and background that parody and satire and burlesque have flourished in its highest form. None of us like censorship or any of the matters that put restraint on the exchange of ideas.

However, I think, on the other hand, that right has to be balanced against the right of the author, or the holder of a copyright, to protect what he has paid for, because any substance given to copyright statutes or laws are common law rights and to that extent put a restraint on the free use of ideas or material.

Mr. Mitchell: Your Honor, you spoke with Mr. Selvin about the implied consent. I would like to leave this thought with you, because I think perhaps you are speaking of implied consent as if it were consent implied in fact, your reference to the fact that the author could withhold his consent, and then of course there couldn't be any consent implied in fact. Actually——

The Court: I was. And I realize there is the question of whether it is implied in law.

Mr. Mitchell: Actually the doctrine of fair use is not based on the consent implied in fact: the doc-

trine is based on consent imposed by law, if you please. The copyright law doesn't say anything about fair use, but the courts, in order to make it workable, have imposed upon it the right of other authors to make fair use of the copyrighted material. [126]

Now, the author can publish in his book, "All rights are reserved, nobody can criticize this work, nobody can quote from it, nobody can burlesque it, nobody can use it in any way"; there wouldn't be any consent implied in fact, that would be negatived by a statement, but they could still make fair use of it. And I don't think that the implied in fact consent solves the problem. The question is, does the law imply a consent to make the kind of a burlesque we are talking about.

The Court: As I say, these are just thoughts, and I was talking about implied in fact consent; and I am interested in finding out just what the cases say about either kind of consent.

It is your contention, is it, that there is a consent implied in law?

Mr. Mitchell: Correct. I don't know whether you call it implied in law or whether you could call it a consent construed by the courts into the copyright statute. And the only reason talk about criticism is important is perhaps because the copyright law doesn't permit quotations for the purpose of criticism; but for this doctrine of fair use, when Time or Life takes a motion picture and tells you the plot of it and quotes various bits of dialogue they would be violating the copyright law, but the

law has said they can do that. Now the question that is before your Honor is, does [127] the law say that you can use these copyrighted things as a springboard to make burlesques? That is a question of law.

The Court: The complaint asks for damages. I take it in view of the injunction that was entered into by agreement, that there has not been any damage and there will not be any damages involved in the case, is that right?

Mr. Selvin: At least we have not tried to prove any specific damages, and so far as the statutory damages provided by the Act are concerned, I can only say that Loew's interest in bringing this action was not to obtain any money to put in its bank account.

The Court: I will consider the issue of damages out of the case.

Mr. Selvin: We are interested in establishing the legal principle and in preventing the exhibition of these what we think are infringements.

The Court: Is there any possibility——

Mr. Selvin: Let me finish just this. I do think, however, that assuming Loew's is right and should prevail, I do not think that it should have cost Loew's anything to establish its rights, and when I agree the issue of damages is out of the case I do not include in that our request for attorneys' fees.

The Court: That is a small matter.

Mr. Mitchell: I think we should be entitled to attorneys' [128] fees too if we prevail. It shouldn't

cost us anything to establish rights that we have been exercising for years.

The Court: That letter we are going to mark 15, get it in within 20 days, the same as the briefs.

Mr. Mitchell: We will.

The Court: There has been running through my mind this thought: Is there any possibility that you gentlemen can get together on this and release the picture, or is this some matter of principle where you want to have the issue fought out and want the matter to go up, regardless of how the case is decided?

Mr. Mitchell: We are just trying to release this one picture, to tell you the truth. We have money invested in it, and it is inconvenient to make another picture, and it is inconvenient to get Mr. Benny to do a live show, and generally it is inconvenient at this point to be stopped. We have gotten too far.

The Court: What went through my mind, there might be various formulas that could be arrived at whereby if you are only interested in this picture this matter might be solved and the picture released. If, on the other hand, this is a matter of principle and somebody wants an adjudication on it, then there is no use spending any time on it.

Mr. Selvin: As far as the plaintiff is concerned, as far as Loew's is concerned, it is a matter of principle. [129] That is indicated by the fact that we are willing to waive damages notwithstanding the fact that the statute, if we are right, gives us

damages which could amount to a considerable sum, in view of the nature of the distribution that was made of the first picture. It is a matter of principle.

The fact that television is, in our opinion at least, a serious competitor of the motion picture industry, the increasing frequency with which a considerable part of the programs by which potential motion picture audiences are kept at home, consists of so-called parodies or burlesques of motion pictures, both current and past, I think, has compelled us to take a stand in the situation and discover one way or the other what our rights are.

The Court: I suspected something like that was involved.

Well, thank you, gentlemen. It is always a pleasure to have able lawyers try cases in this court. You know what you are doing and why you are doing it. And the way you have simplified an intricate case and reduced it to less than a day of testimony and discussion here has been very helpful. I want to thank you.

Mr. Selvin: Thank you, your Honor.

I think you will agree, at any rate, we have not made out of this case the sporting contest type of case that you referred to this morning.

The Court: No. You have complied in spirit and to the [130] letter with that what I consider to be the purpose of our rules.

Mr. Mitchell: It takes a great deal of time to do it, too, your Honor, you would be surprised. I

think probably by coming in here in court in a period of a few days we could have brought in this evidence, but the negotiating of this stipulation has taken a great many hours' time, which I think Mr. Gershon will agree to.

The Court: That is something that we judges do not see. I know in my case I for all intents and purposes left the active practice in about '40, and these civil rules of course were here in '38, I guess was the beginning of them, so I never practiced under these rules. It may be that we judges look at these rules as a godsend to us and litigants, and they may be actually very burdensome to counsel and litigants.

Mr. Mitchell: I think this was an orderly way to handle this case, but I think all lawyers will bear out what you have just said, that there is an awful lot of work for lawyers involved in the Federal Rules.

I didn't look upon this as a Federal Rule job. This was really a job to do in order to try it in an orderly manner. But it does take time.

The Court: Thank you.

(Whereupon, at 4:00 o'clock p.m. Tuesday, January 5, 1954, the hearing was concluded.)

[Endorsed]: Filed October 24, 1955.

[Endorsed]: No. 14928. United States Court of Appeals for the Ninth Circuit. Jack Benny, Appellant vs. Loew's Incorporated, a corporation, and Patrick Hamilton, Appellees. Columbia Broadcasting System Inc., and American Tobacco Company, Appellants, vs. Loew's Incorporated, a corporation, and Patrick Hamilton, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: November 1, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14928

COLUMBIA BROADCASTING SYSTEM, INC., a corporation, et al., Appellants,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON, Appellees.

STATEMENT OF POINTS

Appellants Columbia Broadcasting System, Inc., American Tobacco Company and Jack Benny hereby state the following points on which they intend

to rely on this appeal from the judgment rendered by the United States District Court herein:

1. Appellants' burlesque television skit "Auto Light" did not infringe appellees' copyright in the motion picture "Gaslight" since:

(a) A copyright secured under the United States Copyright Act does not vest in an author or proprietor the right to prevent another from creating a true burlesque of the copyrighted work.

(b) A contrary construction of the Copyright Act would make that Act unconstitutional (Constitution, Article I, Section 8, Amendment 1).

(c) "Auto Light" is a true burlesque of "Gaslight".

(d) Appellants did not "copy" or "take" any substantial amount of material which was protected by appellees' copyright.

(e) If there was any use made by appellants of appellees' copyrighted material, such was a fair use.

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Attorneys for Appellant Jack Benny

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 15, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANTS' AND APPELLEES' DESIGNATION OF RECORD ON APPEAL

To: The Honorable Paul P. O'Brien, Clerk of the above entitled Court:

Appellants Columbia Broadcasting System, Inc., American Tobacco Company and Jack Benny hereby designate the following portions of the record certified to the above entitled court by the Clerk of the District Court, which appellants consider material to the consideration of this appeal:

1. The entire Clerk's Transcript certified by the Clerk of the District Court, comprising pages numbered 1 to 107, inclusive.

2. The entire Reporter's Transcript of the proceedings in the District Court herein on January 5, 1954, comprising pages 1 to 132, inclusive.

3. All exhibits 1 to 14-D, inclusive.

4. This designation of record on appeal.

5. The Statement of Points filed herewith.

With respect to designation 3 above, you are advised that appellees and appellants intend to apply to the above entitled court for an order directing that all of the exhibits transmitted by the Clerk of the District Court be considered in their original form without printing.

Also with respect to designation 3 above, you are advised that following exhibits are in the possession indicated pursuant to stipulation and will be delivered to the Court of Appeals when necessary:

Possession of Appellees

Exhibit 2—Motion picture "Gas Light."

Exhibit 14a—Positive print of motion picture "Mutiny On The Bounty."

Exhibit 14b—Positive print of the motion picture "Doctor Jekyl and Mister Hyde."

Exhibit 14c—Positive print of the motion picture "Edward, My Son."

Exhibit 14d—Positive print of the motion picture "Ah, Wilderness."

Possession of Appellants

Exhibit 6—Transcript of 1945 radio program.

Exhibit 8—Positive print of 1952 Jack Benny television program.

Exhibit 10—Positive print of the proposed 1953 Jack Benny television program.

November ...., 1955.

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Attorneys for Appellant Jack Benny

[Endorsed]: Filed November 15, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION AND APPLICATION FOR CONSIDERATION OF ORIGINAL EXHIBITS

It Is Hereby Stipulated by and between appellants and appellees, through their respective attorneys of record, that subject to the approval of this Honorable Court the following original exhibits in the above-entitled cause which have been transmitted to this Court by the Clerk of the United States District Court for the Southern District of California, Central Division, may be considered by this Honorable Court in their original form without printing:

1. Plaintiffs' Exhibits 1, 3, 4a, b, c, d, 5a, b, e, d, 7, 9, 11, 12, 13, 15 (which is a Stipulation as to the approximate size of the audience for Jack Benny Television programs and which is a part of the transcript), 16 and 17.

Appellants and appellees, through their respective attorneys of record, respectfully make application to this Honorable Court for an order that the original exhibits enumerated above be considered by this Honorable Court on this appeal in their original form without printing.

Appellants and appellees through their respective attorneys of record respectfully make application to this Honorable Court for a further order that the following original exhibits which are presently in the possession of the parties pursuant to stipulation

be retained by said parties until desired by this Honorable Court:

1. Plaintiffs' Exhibits 2, 6, 8, 10, 14a, b, c and d.

Said exhibits are of an inflammable nature and hence it is considered best that they be kept by the parties until desired.

November 15, 1955.

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[Endorsed]: Filed December 1, 1955 Paul P. O'Brien, Clerk.

No. 14928

United States
Court of Appeals
for the Ninth Circuit

JACK BENNY, Appellant,

vs.

LOEW'S INCORPORATED, a Corporation, and PATRICK HAMILTON, Appellees.

COLUMBIA BROADCASTING SYSTEM, INC., and AMERICAN TOBACCO COMPANY, Appellants,

vs.

LOEW'S INCORPORATED, a Corporation, and PATRICK HAMILTON, Appellees.

Supplemental
Transcript of Record

Appeals from the United States District Court for the Southern District of California, Central Division.

In the United States District Court, Southern District of California, Central Division

No. 15602-C

LOEW'S INCORPORATED, a Corporation, and PATRICK HAMILTON,

Plaintiffs,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a Corporation, et al.,

Defendants.

OPINION

Carter, James M., District Judge.

This is an action for infringement of copyright pursuant to Title 28, U.S.C.A., § 1338(a) and Title 17, U.S.C.A., Ch. 2 [§§ 101 to 116.] A cause of action for unfair competition has been joined pursuant to Title 28, § 1338(b). Plaintiffs have waived damages and seek only an injunction.

The case presents novel questions in the law of literary property and is a case of first impression. It presents a major issue—Is a charge of copyright infringement, where the defendant has taken a substantial part of the copyrighted work, defeated by the fact that the appropriated material was used in or as part of a burlesque or parody of the copyright work, rather than in or as part of a serious or independent work? Stated in another way, is a burlesque, which takes a substantial part of a copyrighted motion picture, a fair use?

Loew's Inc., hereafter Loew's, seeks to enjoin Columbia Broadcasting System, Inc., hereafter C.B.S.; American Tobacco Company, hereafter American, and Jack Benny, hereafter Benny, from the performance of a humorous sketch, "Autolight," burlesquing the motion picture, "Gaslight," the literary property of Loew's.

In addition to denials of various of the allegations of Loew's complaint, defendants set forth three affirmative defenses.

1. That the use made by the defendants of "Gaslight" was a fair use, since it was a burlesque;

2. That Loew's complaint is barred by laches;

3. That the use by the defendants of "Gaslight" was a fair use, in that no one viewing the burlesque could reasonably think he was viewing the motion picture, and in that the showing of the burlesque did not and will not satisfy, in whole or in part, the demand that may exist or may have existed, for said motion picture.

Prior to December 5, 1938, Patrick Hamilton, a British subject and one of the plaintiffs[1*] conceived and wrote an original play entitled "Gaslight." The play was first published in the English language and copies of the play were first issued to the public in England, on February 17, 1939. By virtue of the British copyright Act of 1911, this constituted publication and the work was immediately protected,[2]

1*[See page 261 to 274 for footnotes to this Opinion.]

and shortly thereafter was publicly performed, first in Richmond and later in London, both in England.

On November 18, 1941, Hamilton deposited in the United States Copyright office a copy of the edition published in England,[3] and on December 5, 1941, this dramatic composition opened on Broadway under the name "Angel Street." The drama was successful, running 1295 consecutive performances, extending over a period of more than thirty-seven months. In September, 1942, the play "Gaslight" was republished in the United States under the name of "Angel Street" and Hamilton copyrighted this publication in the United States.[4]

The exclusive motion picture rights for "Gaslight" were acquired by Loew's from Hamilton and his assignee on October 7, 1942,[5] and commencing in December of that year Loew's expended $2,458,000 in the production and distribution of an original motion picture photoplay of the drama. The production by Loew's involved the labor and skill of many persons, employing the services of Charles Boyer, Ingrid Bergman and Joseph Cotton, artists in the cinema field. The actual making of the film extended over a period of almost two and one-half years before it was released in national and international distribution on May 5, 1944. Thereupon, Loew's copyrighted the motion picture photoplay.[6]

The picture "Gaslight" was exhibited by Loew's and its licensees in the United States, U. S. Army and Navy installations here and abroad, and in

fifty-six foreign countries. Approximately 52,000,000 persons paid admission here and abroad to see the picture and approximately $4,857,000 was received in gross rental.

The picture was withdrawn from domestic release in November, 1946. The international distribution still continues. It is a customary and usual practice in the motion picture industry to reissue pictures which have been highly successful in their initial release, five or more years after their first release. Substantial rentals are often received for such reissues. Loew's have not reissued "Gaslight." The script and the film is in evidence and the film has been viewed by the court.

On or about October 14, 1945, during Loew's domestic distribution of Gaslight, Benny, a performer in the field of comedy, caused to be written, produced, performed, and broadcast over a national radio network, a half-hour show featuring a fifteen-minute burlesque of the drama "Gaslight" with Benny and Ingrid Bergman in the leading roles. American was at this time sponsor of the show.

Loew's did not have prior notice of the Benny show, except as shown by Benny's testimony, hereafter. Bergman furnished to Benny's writers her copy of the shooting script of the motion picture "Gaslight." Loew's did not have notice of her act nor did it consent thereto. Prior to the preparation of the script, the Benny writers viewed the motion picture "Gaslight," and the stage play "Angel

Street." Clearly the defendant Benny, had access to the copyrighted material. The point is not in issue. A record transcription of this radio program is in evidence and has been heard by the court. A script of the program is also in evidence.

The radio program was publicly performed at the U. S. Army Redistribution Center in Santa Barbara, California, and from there put on the National Broadcast system.

However, it was stipulated that if Benny were called as a witness, he would testify that prior to this performance and to enable the prospective audience to fully appreciate the burlesque, Benny had requested of Loew's that a print of the then current photoplay "Gaslight" be sent to the Center for exhibition in the week preceding the radio program, and that Loew's furnished such a print. In the performance of the burlesque Benny burlesqued Charles Boyer, the male star in the picture, and Miss Bergman, appearing as Benny's guest star, performed a travesty upon her original screen role in Gaslight. No claim of infringement was ever made regarding this burlesque.[7] We credit Benny's testimony and find the radio program was done with Loew's consent.

More than six years later, on January 27, 1952, C.B.S. caused to be written and produced a Benny half-hour television program featuring Benny and Barbara Stanwyck in the leading roles. This was again a burlesque of "Gaslight," and was on January

27, 1952, broadcast over the C.B.S. networks, and sponsored by American. Again the burlesque occupied about fifteen minutes of the half-hour show, this performance however, being in an audio-visual medium, made some use of stage props. The actual performance was kinescoped[8] for transmission over those stations of the C.B.S. network, which were physically unable to receive the live broadcast. A copy of the film of television program and the script is in evidence and the court has seen the film. Benny received compensation for his services from C.B.S. and C.B.S. received compensation from American.

Loew's, on January 30, 1952, dispatched a letter to C.B.S. inferring that they considered the latter burlesque an infringement of their property. Loew's further notified C.B.S. that they intended to "enforce our rights if they be infringed." C.B.S. acknowledged receipt of this letter but denied infringement claiming "fair use" including the "right to parody literary properties." Loew's then informed C.B.S. that the program constituted a copyright infringement. The dispute was not settled.

About May 28, 1953, C.B.S. commenced the preparation of a motion picture for television, burlesquing "Gaslight" and starring Benny and Barbara Stanwyck. On June 9, 1953, Loew's received notice that defendants contemplated this further remake of the "Gaslight" burlesque for the Benny television show. On June 9, 1953, Loew's gave notice that they con-

sidered the prior performance and the proposed remake, an infringement of their copyright.

Loew's commenced this action on June 10, 1953, and a restraining order was issued. It was modified by consent to permit the filming of the proposed television show and the film was impounded by court order. A copy is in evidence and has been viewed by the court. It was stipulated that defendants intend to and will, unless and except as restrained by this court, exhibit and cause to be exhibited the film throughout the United States over all the television channels and networks of C.B.S. Prior to June 10, 1953, C.B.S. had paid or obligated itself in the sum of $54,167 for the cost of the script and filming of the proposed television show.

The program was planned for the year commencing September, 1953. The parties have stipulated that Benny's television program, between September and December, 1953, reached from 6,073,000 to 8,882,000 homes and 18,826,000 to 27,534,000 viewers, the exact number differing on various dates.

I.

There Was a Substantial Taking by Defendants

A detailed comparison of plaintiffs' "Gaslight" and defendants' "Autolight" appears in the margin.[9] The comparison leads the court to the following conclusions of fact; (1) that the locale and period of the works are the same; (2) the main setting is the same; (3) the characters are generally

the same; (4) the story points are practically identical; (5) the development of the story, the treatment (except that defendants' treatment is burlesque), the incidents, the sequences of events, the points of suspense, the climax are almost identical and finally, (6) there has been a detailed borrowing of much of the dialogue with some variation in wording. There has been a substantial taking by defendants from the plaintiff's copyrighted property. This the defendants impliedly, though not in so many words, concede. We say impliedly, because the defendants defend on the ground that they have made a burlesque of "Gaslight;" that such is "fair use;" that plaintiffs are barred by laches, and finally that the value of Loew's "Gaslight" has not been impaired and that Loew's have not and will not suffer damage.

It is well settled law that the owner of a copyright is entitled to be protected against the taking of a substantial portion of his protectable material. Universal Pictures Co., v. Harold Lloyd Corp., [9 Cir. 1947] 162 F. 2d 354, where the court said, p. 361. "The whole picture need not be copied to constitute infringement. The mere copying of a major sequence is sufficient." Sheldon v. Metro-Goldwyn Pictures Corp., [2 Cir. 1939] 81 F. 2d 49, 56, "* * * it is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate." Ansehl v. Puritan Pharmaceutical Co., [8 Cir. 1932] 61 F. 2d 131, 137, "A copy of a 'substantial part' constitutes an infringement," and cases cited therein.

"* * * When a study of the two writings is made and it is plain from the study that one of them is not in fact the creation of the putative author, but instead has been copied in substantial part exactly as in transparent rephrasing to produce essentially the story of the other writing, it infringes." Warner Bros. Pictures v. Columbia Broadcasting System, [9 Cir. 1954] 216 F. 2d 945, 950; cert. den.

Folsom v. Marsh, [Cir. Ct. Mass. 1841] 9 Fed. Cases 342, Case #4901, is one of the earliest cases on copyright law in the United States. The case concerns a "Life of Washington" which the court found infringed an earlier copyrighted work. The court met the issue as to how much taking constitutes an infringement. Justice Story's opinion, widely quoted, laid down the rule that the test is not alone quantitative but qualitative. The Justice said that courts must look (p. 348) "to the nature and objects of the selections made, the quantity and value of the materials used. * * *" and at (p. 348), "It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance." Story v. Holcombe, [Cir. Ct. Ohio, 1847] Case #13497, 23 Fed. Cases, 171, 173, said:

> "The infringement of a copyright does not depend so much upon the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages, they take from it that in which its chief value consists * * *"

Although ideas, abstract conceptions and similar matters are not protectable, on the other hand it is clear that the author's manner of treatment, expression, the incidents and details, and the sequence of events by which he works out and develops the abstractions, are copyrightable elements of his work, and will be protected. Sheldon v. Metro-Goldwyn Pictures Corp. [2 Cir. 1936], 81 F. 2d 49, at 54; "* * * others may 'copy' the 'theme,' or 'ideas' or the like, of a work, though not its expression." Dam v. Kirk La Shelle Co., [2 Cir. 1910] 175 Fed. 902, 907; MacDonald v. Du Maurier [2 Cir. 1944] 144 F. 2d 696, 701; De Acosta v. Brown [2 Cir. 1944] 146 F. 2d 408, 409-10; cert. den. 325 U. S. 862; Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App. 2d 556, 561-562, 90 P. 2d 371, 374. "Although there can be no property in an author's ideas, 'there may be literary property in a particular combination of ideas or in the form in which the ideas are embodied.' (Fendler v. Morosco, 253 N. Y. 281.)"

If this was the ordinary plagiarism case, without the defense of burlesque as a fair use, it would be crystal clear, under the controlling authorities, that there had been access, a substantial taking and therefore infringement.

We are thus brought face to face then with the major issue in the case. Is a substantial taking of a copyrighted property permissible when the taking is by use of burlesque and rests for justification on the theory of fair use? We also discuss the additional defenses asserted.

II.

The Extent of The Doctrine of Fair Use

(a) Generally

Copyrights and the rights flowing therefrom are entirely creatures of statute. Pursuant to the constitution[10] Congress enacted the Copyright Act[11] and "instead of sanctioning an existing right * * * created it." Wheaton v. Peters [1834] 8 Pet. 591, 660-661. Thus, "the protection given to copyrights in this country is wholly statutory." White-Smith Music Pub. Co. v. Apollo Co., [1908] 209 U. S. 1, 15.

> "By the common law, the author of a writing possesses the sole and exclusive right to publish it, but upon and after the first publication the writing may be published by anyone including the author, since the writing has gone into the public domain. Bobbs-Merrill Co. v. Straus, 1908, 210 U. S. 339, 28 S. Ct. 722, 52 L. Ed. 1086; Bobbs-Merrill Co. v. Straus, 2 Cir. 1908, 147 F. 15, 15 L.R.A., N. S. 766; Harper & Bros., v. M. A. Donohue & Co., CC 1905, 144 F. 491. The copyright statute extends the author's sole and exclusive right in accordance with its terms and provisions. Constitution of the United States, Art. I, § 8, Clause 8; Title 17 U.S.C.A.; Bobbs-Merrill Co. v. Straus, 1908, 210 U. S. 339, 28 S. Ct. 722, 52 L. Ed. 1086; Bobbs-Merrill Co. v. Straus, 2 Cir. 1908, 147 F. 15, 15 L.R.A., N. S. 766. In other words, it reserves the writing from the public domain for the ef-

> fective period of the copyright. What we have just said is what is meant by courts when they say: 'When the copyright comes in, the common law right goes out.' * * *" Warner Bros. Pictures v. Columbia Broadcasting System, [9 Cir. 11/9/54] 216 F. 2d 945, at 948; cert. den.

The history of the copyright statutes show an extension, legislatively, to the creator of protectable material.[12] The first copyright statute in 1790 gave protection to authors for fourteen years and by renewal for fourteen years more. The period has been increased by statute[13] to twenty-eight years with a renewal period in certain cases to the proprietor, and in others to the heirs of an author.

When case law held that abridgements or condensations and foreign translations of copyrighted works, were not an infringement, Story v. Holcombe, [C. C. Ohio 1847] 23 Fed. Cas. 171 (case #13497); Stowe v. Thomas, [C. C. Pa. 1853] 23 Fed. Cas. 201, (Case #13514); statutes amendatory of the copyright laws gave protection.

Judicially, the courts have taken a broad view of copyright protection in order to give to the copyright proprietor the exclusive right "to any lawful use of his property whereby he may get a profit out of it * * *" King Features Syndicate v. Fleischer [2 Cir. 1924] 299 Fed. 533, 536.

The purpose of the copyright laws are well summarized in Mazer v. Stein, [1954] 347 U. S. 201, 219:

"'The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.' United States v. Paramount Pictures, 334 U. S. 131, 158. However, it is 'intended definitely to grant valuable enforceable rights to authors, publishers, etc., without burdensome requirements; 'to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.' Washingtonian Co. v. Pearson, 306 U. S. 30, 36 * * * Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

The doctrine of fair use[14] arises from the essential nature of the copyright. While a patent "'confers an exclusive right to use * * * a copyright contemplates and permits fair use by all persons of the copyrighted work * * *' 18 C.J.S. Copyright and Literary Property, Sec. 92, p. 213," Karll v. Curtis Publishing Co. [D. C. Wis., 1941], 39 F. Supp. 836, 837.

Fair use and its companion fair comment have been widely discussed by the writers.[15] Ball in Law of Copyright and Literary Property states:

"The right of subsequent authors, publishers and the general public to use the works of others to a limited extent has always been universally recognized as consistent with the object of publication and the policy of encouraging

the dissemination of knowledge, learning and culture; * * *" (p. 259)

* * *

"Fair use may be defined as a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright. Fair use is technically an infringement of copyright, but is allowed by law on the ground that the appropriation is reasonable and customary." (p. 260). [Emphasis added.]

The right of fair use clearly exists, but the general statements of the text writers must be reduced to specifics in order to understand and define the extent and application of this right.

(b) The Impact of Commercial Gain or Profit.

It will be noted that Sec. 1, U.S.C.A., Title 17, consisting of five subdivisions, refers to doing the prohibited act "for profit" only in sub. (c) concerning a "lecture, sermon, address or similar production or other nondramatic literary work," and sub. (e) referring to "musical composition." The subdivisions concerning dramatic works which we are here concerned with, (b) and (d), make no such reference to "for profit." We assume that the words, "for profit" were used advisedly by Congress and insofar as a dramatic work is concerned, there may be infringement without a showing that the infringing was done for a profit.

But the factor of use for commercial gain has been considered by the courts in connection with most, if not all, infringements of copyrighted material, regardless of the particular subdivision of Sec. 1, U.S.C.A. Title 17, which is invoked. Thus, in the field of science and the fine arts, we find a broad scope given to fair use. "This doctrine permits a writer of scientific, legal, medical and similar books or articles of learning to use even the identical words of earlier books or writings dealing with the same subject matter." Thompson v. Gernsback, [D.C.N.Y. 1950] 94 F. Supp. 453, 454. The writer of such works "invites reviews, comments and criticism"[16] and we could add, the use of the books and portions and quotations therefrom for the purpose of the advancement of learning. He does not invite or consent to its use for commercial gain alone.

"* * * The law permits those working in a field of science or art to make use of ideas, opinions, or theories, and in certain cases even the exact words contained in a copyrighted book in that field. Sampson & Murdock Co. v. Seaver-Radford Co., [1 Cir.] 140 F. 539. This is permitted in order, in the language of Lord Mansfield in Sayre v. Moore, 1 East 361, 102 Eng. Reprint 139, 'that the world may not be deprived of improvements, nor the progress of the arts be retarded.' In such cases the law implies the consent of the copyright owner to a fair use of his publication for the advancement of the science or art," said Judge Maris of the Third Circuit, then District Judge, in Henry Holt & Co., Inc., v. Liggett

& Myers Tobacco Co., [D. C. Pa. 1938] 23 F. Supp. 302, 304. We do not think Judge Maris' use of the word art was used in a sense broad enough to include a T. V. program allegedly taken from a motion picture.

Criticism is an important and proper exercise of fair use. Reviews by so-called critics may quote extensively for the purpose of illustration and comment.[17]

As we draw further away from the fields of science or pure or fine arts, and enter the fields where business competition exists we find the scope of fair use is narrowed but still exists.

The impact of competition is shown in the field of publishing law books where the decisions are somewhat confusing. Using copyrighted law digests to run down cases and copying "lists of cases;"[18] taking citations contained in a copyrighted work to cite in another work;[19] and obtaining "cumulative citations and histories of the affirmances and reversals of cases" from a copyrighted work "for annotation purposes"[20] have all been termed a fair use. But by the same cases, other and more extensive use has been labeled infringement.

A synopsis of an opera,[21] or indices[22] of a copyrighted property may be properly made under the rule of fair use. The use of a copyrighted credit book for the purpose of ascertaining the name of persons and corporations engaged in business for use in another's work[23] is not infringement.

On the other hand, the taking of word lists, amounting to less than 15% of the printed matter, from French language books and adding thereto, when both "books met exactly the same demand on the same market" was an unfair use,[24] and the taking of three sentences from a doctor's copyrighted medical work by a tobacco company to advertise its cigarettes was not a fair use.[25] Where a newspaper used in an article, factual material taken almost verbatim from the copyrighted material in a rival newspaper, there was an unfair use even though the taking was "such a little one."[26]

Where a competing biography of Hans Christian Anderson leaned heavily on the copyrighted volume, and there was a copying of substantial and material parts of the book, fair use was not a defense.[27] The copying of choruses of a copyrighted song was a copying of a substantial and material part, in an action between competing publication companies.[28]

In connection with the showing of a movie, the fact that there was played only "short excerpts" of a copyrighted song, is no defense.[29]

Certain conclusions can be drawn from these cases. Judge Yankwich stated in a recent article:[30]

> "If the amount reproduced is legitimately necessary to review the book, or is a part of a scientific or other exposition of the subject, in which the theories expounded by others must be discussed, the use, regardless of quantity, is fair. If, on the other hand, the appropriation

of the copyrighted product of another is motivated by the desire to derive commercial benefit, the use, regardless of quantity, is unfair * * *". [Emphasis added.]

We have some question as to the breadth of the conclusions, more particularly to the second sentence, but think the statement generally correct. It was obviously made to point up the impact of commercialism on the doctrine of fair use. We would conclude that the purpose for which the use was made is of major importance, in consideration with various other factors, in arriving at a sound determination of the extent of fair use; that broader scope will be permitted the doctrine where the field of learning is concerned and a much narrower scope where the taking is solely for commercial gain.

(c) American Cases Referring to Parody or Burlesques.

Turning now to American cases involving parody or burlesque,[31] we find illuminating early decisions. The attempt to defend against copyright infringement by the claim that the infringing work was "merely a parody or burlesque" is not new. Such an attempt has been the subject of several decisions and has been disposed of, not by determining whether the alleged infringing use was parody or burlesque, but by ascertaining whether it amounted to a taking of substantial, copyrightable material. In other words, a parodized or burlesqued taking is treated no differently from any other appropria-

tion. Bloom & Hamlin v. Nixon, [C.C.E.D. Penn. 1903] 125 Fed. 977, involved the burlesque by Fay Templeton of the performance of one Lotta Faust in another dramatico-musical work, by singing the chorus of a copyrighted song and imitating the peculiar actions, gestures and tones of Miss Faust. Relief was denied and the court observed, "surely a parody would not infringe the copyright of the work parodied, merely because a few lines of the original might be textually reproduced." (p. 978.) The case stands for the proposition that where a small or unsubstantial part of the copyrighted material was used, the principal part of defendants' performance, being stage business, there is no infringement.

Hill v. Whalen & Martell Inc., [D.C.N.Y. 1914] 220 Fed. 359, involved the dramatization of plaintiff's copyrighted cartoon strip,[32] Mutt and Jeff. The defendant was held to have infringed, even though defendant contended the infringing production, "was a mere parody or burlesque of the original and was so intended." (p. 359.) A reading of the case shows a substantial taking. Though the court based its decision on the tendency of the infringing work to decrease the demand for the original (a point we consider infra) it is clear that the defense based on a right to burlesque was rejected.

The dividing lines between permissible and non-permissible parody is strikingly illustrated by two of the cases which are found immediately next to

each other in the reports—Green v. Minzensheimer, [C.C.N.Y. 1909] 177 Fed. 286, and Green v. Luby, [C.C.N.Y. 1909] 177 Fed. 287. In the first of these cases a parodized imitation of an actress' manner or style of singing a song, but in which no copyrighted material owned by the plaintiff was used, was held nonactionable. On the other hand, in the Green v. Luby case, where, in addition to mimicry or parody of the mannerisms of an actress who frequently sang it, a copyrighted song was sung, infringement was found. The court said in the Luby case, (p. 288):

"The next question is one of infringement. The defendant admits that she sings the copyrighted song with musical accompaniment, but she says that she does so merely to mimic the complainant Irene Franklin Green. She contends that she gives impersonations of various singers, including said complainant, and, as incidental to such impersonations, sings the songs they are accustomed to sing. The mimicry is said to be the important thing; the particular song, the mere incident. But I am not satisfied that, in order to imitate a singer, it is necessary to sing the whole of a copyrighted song. 'The mannerisms of the artist impersonated,' to use the language of the defendant's brief, may be shown without words. And if some words are absolutely necessary, still a whole song is hardly required. And if a whole song is required, it is not too much to say that the imitator should se-

lect for impersonation a singer singing something else than a copyrighted song. Bloom v. Nixon, [C.C.] 125 Fed. 977, is distinguishable in that in that case the chorus only of the copyrighted song was sung. Green v. Minzensheimer (decided by this court March 19, 1909) 177 Fed. 286, is distinguishable in that in that case the defendant imitated the singer without musical accompaniment, and the testimony as to just what she did was not clear." [Emphasis added.]

(d) Other Modes.

The question as to whether the protection given the proprietor of the copyright extends to other modes or forms of using or exhibiting his work would seem to be answered in the affirmative by the foregoing cases. Before we proceed to additional cases on that point, we note the statute itself.

Sec. 1, U.S.C.A., Title 17 reads in part—"Exclusive rights as to copyrighted works. Any person entitled thereto, upon complying with the provisions of this title shall have the exclusive right: * * * (b) to * * * make any other version[33] thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; * * * (d) to perform or represent the copyrighted work publicly if it be a drama; * * *; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part; it may in any manner or by any method be exhibited, performed, represented,

produced, or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever; * * *" [Emphasis added.]

Obviously the words "manner" and "method" are words of ordinary meaning, and must have different meanings or both would not have been used. But we do not rest our decision on the language of the statute and so do not decide whether "manner" is broad enough to cover burlesque.

The cases have considered the question as to other modes for the use of the copyrighted work but generally without reference to the express language above referred to. In King Features Syndicate v. Fleischer, [C.C.A. 2, 1924] 299 Fed. 533, at 535, the court said:

> "Copying is not confined to a literary repetition, but includes various modes in which the matter of any publication may be adopted, imitated, or transferred with more or less colorable alteration. The disguise of the source from which the material was derived does not defeat the protection of the copyright, nor does taking a part of the work constitute an evasion of the copyright. Lawrence v. Dana, Fed. Cas. No. 8,136, 4 Cliff. 80. The appellees did not take all of the copyrighted matter, or all its principal characters, but took one, the idea of the horse 'Sparky.'
>
> "We do not think it avoids the infringement of the copyright to take the substance or idea,

and produce it through a different medium, and picturing in shape and details in sufficient imitation to make it a true copy of the character thought of by the appellant's employee. Doing this is omitting the work of the artisan, but appropriating the genius of the artist. Falk v. Howell & Co., [C.C.] 37 Fed. 202." [Emphasis added.]

The emphasized words from the King case (supra)[34] have been quoted and relied upon in Nutt v. National Institute etc., [2 Cir. 1929] 31 F. 2d 236, 238, and Universal Pictures Co. v. Harold Lloyd Corporation, [9 Cir. 1947] 162 F. 2d 354, 361. In the King case (supra) the language was particularly in point since the defendants made a toy horse, fashioned after, labeled, and sold as "Spark Plug" and thereby infringed the plaintiff's copyright to a book of cartoons about a horse named "Spark Plug."

In Falk v. Donaldson, [Cir. Ct. S.D.N.Y. 1903] 57 Fed. Rep. 32, a lithograph infringed a photograph. In Falk v. Howell & Co. [Cir. Ct. S.D.N.Y., 1888] 37 Fed Rep. 202, a photograph was infringed although the infringing design was stamped on leather intended for the bottom or back of a chair. In Bracken v. Rosenthal, [Cir. Ct. N. D. Ill. 1907] 151 Fed. Rep. 136, a photograph of a copyrighted statue was held to infringe. In Rosenthal v. Stein, [9 Cir. 1953] 205 F. 2d 633, affirming Stein v. Rosenthal, [D. C. Cal. 1952] 103 F. Supp. 227, copyrights of statuettes were held infringed by similar statuettes used as bases for electric lights.[35]

(e) Defendants' Authorities.

Defendants think they find some support for their contention that burlesque is a fair use and therefore cannot constitute infringement even if the taking is substantial, by reference to English cases and textbook writers. But the exhaustive analysis of these matters by plaintiff in its final brief, utterly shatters any support therein for defendants' position.

Glyn v. Weston Feature Film Co., Ltd., [1916] 1 Ch. 261; 114 L. T. Reports 354, was a trial court opinion based on the facts. The judge found that "the incidents of the film to which even so remote a resemblance with any in the novel can be found are exceedingly few in number or importance * * * on the whole * * * I have arrived at the conclusion of fact that the film does not constitute any infringement of the plaintiff's copyright in the novel." (pp. 267-268). Thus the holding of the case was that the taking was not substantial. Justice Younger's further conclusion that burlesque would not constitute infringement and that "no case can be found * * * in which a burlesque * * * has been treated as an infringement of copyright * * *" (p. 268) was labeled by him as unnecessary for the decision and therefore was dictum.[36] The Glyn case dictum is not considered to correctly state the English law as to burlesque[37] and certainly does not control our case.

Carlton v. Mortimer, McGillivray's Copyright Cases, [1917-23] 194, the second English case relied

on by defendants is merely an extract prepared by the case book editor. Although it makes reference to the dictum in the Glyn case, in reality the case holds that the taking must be substantial and that the "burlesquing of these two trifling incidents * * * under a title which was somewhat similar in sound to, but yet different in fact from, the title of the novel, did not amount to an infringement * * *" (pp. 195-196)[38] Any other significance to be attached the case would be contrary to English law.[39]

The third English case Hanfstaengl v. Empire Palace, [1894] 3 Ch. 109, give defendants no support. The plaintiff was the owner of German copyrights in some paintings. These paintings were more or less reproduced as live tableaux in a theatrical presentation. The tableaux, it was held in prior litigation, did not infringe Hanfstaengl's copyright. (Hanfstaengl v. Empire Palace [1894] 2 Ch. 1). A new complaint was based on the publication, in defendant's newspapers, of rough sketches, not of the original paintings, but of the tableaux. All that can properly be said to have been decided is that a copy, of a copy which is not itself an infringement of the original, does not infringe, at least when its resemblance to the original is slight and remote.

Defendants' reliance on text writers give them no better support for their contention. Many of the works cited are not legal treatises but are apparently written for the lay public[40] and in any event they are no more authoritative than the decisions on

which they purportedly rely. Most of these writers discuss generally fair use and not specifically burlesque. Weil, Ball and Amdur are specifically contrary to defendants' position.[41]

Spring states, "The right of a fair comment, as to satire or burlesque, has seldom been openly questioned. Only the extent of use has been questioned;" and in referring to mimicry or satire which he groups as "parody," states "the element of good faith is essential in parody, i. e. it is essential that the use involved be humorous and be limited to satire, and that it not be plain copying as a device to sell entertainment by giving another's material.[42] [Emphasis added.]

Lindey states, "Parody * * * is not infringement unless it is a transparent cover-up for stealing."[43]

(f) Proof of Other Burlesques.

Defendants argue that they have shown a long established custom of the burlesquing of copyrighted works[44] and acquiescence of this view of the law by persons most interested, and cite 50 Amer. Jur., Statutes, sections 319 and 320, pp. 309 and 312, "indeed the practical construction of a statute, or the meaning publicly given it by contemporary usage, is usually presumed to be the true one," (pp. 309-310) and Sutherland, "Statutory Construction, 3rd Ed. § 5106, p. 518, "interpretations made by those lacking express statutory authority to make interpretations are given somewhat less weight in the construction of legislation. However, interpretations made

by the public and those affected by a law, interpretations resulting from the practice of the Bar, and interpretations made by administrative officials of similar legislation in other jurisdictions may have important bearing as to the meaning of a statute."

Defendants make much of burlesque produced in the past, based on the then current dramatic productions, dwelling at length on "Arizona" and the burlesque of it, "Travesty on Arizona." Both played in the fall of 1900.

But defendants' showing lacks an important element, namely a showing that no consent was given by the holder of the copyright permitting the showing of the burlesques. Conceivably, the owner of the "Arizona" copyright, (1) gave written approval, (2) oral approval, or (3) implied consent, thinking the burlesque might increase the popularity of his play and purposely doing nothing. Without a showing of an unconsented use, defendants' argument falls completely. Nor can we presume consent or lack of consent.[45] Many of the burlesques cited by Dr. Baxter were of works long in the public domain. Many were of works created long before copyrights existed. No showing was made as to which originals had been copyrighted.[46]

In the case of the 63 burlesques made by Benny, there is as to most of them a similar lack of proof by the defendants. The record shows that in five instances, consent was obtained and that in twelve

instances the materials were in the public domain.[4] We cannot speculate as to the remainder.

Assuming for argument some weight to popular construction, the argument falls completely in the absence of proof as to consent or lack of consent to the creation of these burlesques. If for example, consent had been given expressly or impliedly in a number of cases, these cases would be no part of a custom permitting the burlesque of copyrighted material, regardless of consent. The defendants' arguments reminds one of the famous Kipling verse,

When 'Omer Smote 'Is Bloomin' Lyre

When 'Omer smote 'is bloomin' lyre,
He'd 'eard men sing by land an' sea;
An' what he thought 'e might require,
'E went an' took—the same as me!

The market-girls an' fishermen,
The shepherds an' the sailors, too,
They 'eard old songs turn up again,
But kep' it quiet—same as you!

They knew 'e stole; 'e knew they knowed.
They didn't tell, nor make a fuss,
But winked at 'Omer down the road,
An' 'e winked back—the same as us!

To conclude, defendants have shown no custom permitting burlesque or parody of copyrighted material over the objections or regardless of the consent of the copyright holder.

(g) A Substantial Taking by Use of Burlesque Constitutes Infringement.

We proceed to a determination of the major question here presented. In the instant case, the economic value of plaintiffs' property far exceeds the value of the defendants' work. Loew's expenditure in production and distribution of "Gaslight" amounted to $2,458,000 as compared with an estimated $64,883.66 by the defendants in their production of the 1952 and 1953 burlesque exclusive of American's compensation to Benny. Television is engaged in active competition with motion pictures. The taking was for commercial gain for use in a competing entertainment field.

The serious, near tragic vein of the original, "Gaslight" was converted into the broad, low comic vein of the burlesque. Benny, using gags, puns, exaggerated mimicry, slapstick and distortion, all matters within the common fund of the public domain, has taken a substantial part of plaintiff's property, "Gaslight," and inverted of mood from serious to humorous. Tragedy and comedy, like love and hate are but opposite faces of the same coin. Defendants have transposed the work, from the serious to the comic vein. This is analogous to the situation in Leon et al v. Pacific Telephone and Telegraph Company, [9 Cir. 1937] 91 F. 2d 484, (supra), when defendant took plaintiff's copyrighted telephone book and inverted the list from an alphabetical one to a numerical one. Our case tests the statement of the court therein that no case can be found holding that

"wholesale copying and publication of copyrighted material can ever be fair use." (p. 486).

From the discussion heretofore and the authorities collected, we conclude that plaintiff's have a property right in "Gaslight" which defendant may not legally appropriate under the pretense that burlesque as fair use justifies a substantial taking; that parodized or burlesque taking is to be treated no differently from any other appropriation; that, as in all other cases of alleged taking, the issue becomes first one of fact, i.e., what was taken and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists.

On the other hand, there is no dispute as to the right of the stranger to the copyright to take an incident, a character, a theme, or even a bare plot and then in Dr. Baxter's apt words, "take off into the blue" and create a new work by burlesque,[48] or to make an even more extensive use of the copyrighted material so long as a substantial part is not taken.

That this line between the permissible and the forbidden may be hard to draw does not prevent its application. Nichols vs. Universal Pictures Corp., (2 Cir. 1930) 45 F. 2d 119, 122; cert. den. 282 U. S. 902. The taker or user acts at his peril as does anyone who under our system of laws, makes use of another's property.

III.

Reducing Demand for Plaintiff's Work Not an Essential to Recovery.

Defendants contend that the decisive test of whether the burlesque of a copyrighted literary property constitutes fair use is whether the burlesque will reduce the demand for the copyrighted work by superseding such work and satisfying the demand of the public therefor. They rely on certain language in Folsom vs. March, (Mass. 1841) Fed. Case #4901, 9 Fed. Cas. 342, at 344, and in Lawrence vs. Dana, (Mass. 1869) Fed. Case #8136, 15 Fed. Cas. 26, at 61. All that either of these cases said was that a reviewer may not by his work, "supersede" the original.

Hill vs. Whalen, (D. C. N. Y. 1914) 220 Fed. 359, 360, is relied on when the court says: "One test which, when applicable, would seem to be ordinarily decisive, is whether or not so much as has been reproduced as will materially reduce the demand for the original. * * * The reduction in demand, to be a ground of complaint, must result from the partial satisfaction of that demand by the alleged infringing production. A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright * * *" No authority is cited and the court referred to "fair criticism, serious or humorous," in drawing the conclusions above.

Also relied on are Justice Younger's remarks in Glyn vs. Western Features Film Company Ltd., [1916] 1 Ch. 261, 114 L.T. Rep. 354, 356, 1 Ch. 261, 268, that the older English cases "insist upon the necessity of establishing that the alleged piracy is calculated to prejudice the sale or diminish the profits or supersede the objects of the original work, whereas it is well known that a burlesque is usually the best possible advertisement of the original * * *"

But Leon vs. Pacific Tel. & Tel. Co., (9 Cir. 1937) 91 Fed. 2d 484, disposes completely of defendants' contentions. There the defendant relied on the fact his numerical telephone directory "serves a different purpose than plaintiff's alphabetical directory." At pp. 486-87 the court said:

> "The fact that plaintiff has not chosen to arrange its material in the inverted form used by appellants is no determinant of fair use. The inversion, without license, is not permitted merely because the holder of the copyright has not so used it. This is settled by the case of Fox Film Corporation vs. Doyal, 286 U. S. 123, 127, 52 S. Ct. 546, 547, 76 L. Ed. 1010, where the Supreme Court said: 'The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property.'
>
> A like conclusion has been expressed by the courts of England. Weatherby & Sons vs. In-

ternational Horse Agency and Exchange, Ltd., (1916), 2 Ch. 297, 304; 79 L. J., Ch. 609 * * * The court said.

'Then it is said that the real and only test as to whether or not the defendants have made an unfair use of volume 21 of the Stud Book lies in the answer to the question whether there will be any competition between such volume and the defendant's book * * * But, in my opinion, an unfair use may be made of one book in the preparation of another, even if there is no likelihood of competition between the former and the latter. After all copyright is property, and an action will lie even if no damage be shown * * *.' "

The mere absence of competition or injurious effect upon the copyrighted work will not make a use fair. The right of a copyright proprietor to exclude others is absolute and if it has been violated the fact that the infringement will not affect the sale or exploitation of the work or pecuniarily damage him is immaterial. Falk vs. Donaldson, (Cir. Ct. N. Y. 1893) 57 Fed. 32, 36-37; Reed vs. Holliday, (Cir. Ct. Penn. 1884) 19 Fed. at 325, 327; Warren vs. White & Wyckoff Mfg. Co., (D. C. N. Y. 1930), 39 F. 2d 922, 923; Johns & Johns Printing Co. vs. Paull-Pioneer Music Corp., (8 Cir. 1939) 102 F. 2d 282; Harms vs. Cohen, (D. C. Penn. 1922) 279 Fed. 276, 279; MacMillan vs. King, (D. C. Mass. 1914) 223 Fed. 862, 867-868.

We have heretofore commented on the impact of competition or the taking for a profit on the scope of fair use.[49]

We conclude that it is not incumbent on the copyright holder to show either damage, or a diminuting of the value of his property or a lessening of the demand for the copyrighted work. On the other hand, the fact that the infringing work competes with the copyrighted one or has been issued for commercial gain, rather than in the interests of advancement of learning is a factor to be considered in determining the extent of fair use, and in determining whether the taking was substantial.

IV.

Effect on Burlesque

The defendants make several broad contentions as to the results that would flow from a decision for the defendants, (1) that it would be the death knell to the art of burlesque; (2) that since burlesque has always flourished in democratic countries, such a decision would be a frontal attack on freedom in our democracy.

It seems patent that by 1955 the public domain abounds with material suitable for burlesque, and when there is added thereto the instances where the consent, expressed or implied, of a copyright holder may be obtained, there should be no problem in the defendants obtaining bounteous materials for a pursuit of this art.

Secondly this decision points out that an isolated incident, character, event, theme or setting may still be used by a stranger to the copyright, without consent, under the doctrine of fair use and the newly created burlesque, starting from such a spring board "may take off into the blue" to use Dr. Baxter's apt phrase. We hold only that the stranger to the copyright may not appropriate the whole or a substantial part of the copyrighted material. Fertile minds will experience no difficulty in providing Mr. Benny and others in his fraternity with ample material for the exercise of their special art. We have not sounded a death knell on burlesque; in fact we hope we have cleared the air sufficiently to give it more room for its erratic flights.

As for an attack on freedom, we confess we have difficulty in visualizing the loss of that freedom if Benny's activities are curtailed by this decision. Instead, the decision reaffirms a principle inherent in the democratic way of life—the right to own and enjoy one's own private property without fear of appropriation by another. The concept of private ownership of literary property is equally entitled to protection and is more in danger in this proceeding than are our other freedoms.

V.

Laches

Defendants claim plaintiffs are barred by laches from obtaining the relief here prayed. Plaintiffs by

the pretrial stipulation waived damages and seek only injunction.

The three burlesques, i.e., the Radio show in 1945,[150] the television show in 1952 and the impounded television show of 1953 are generally and basically the same. Crediting Benny's testimony, the facts show plaintiff consented to the 1945 Radio show. Clearly consent for that particular show and the use of copyrighted material therein, does not impart consent to any other or different use of it. The showing of a copyrighted motion picture at a different time or theatre from that for which license was granted, infringes. Metro-Goldwyn-Mayer, etc. vs. Bijou Theatre Co. et al., (1 Cir. 1932) 59 F. 2d 70; Tiffany Productions Inc. vs. Dewing, (D. C. Md. 1931) 50 F. 2d 911; 912-15; Metro-Goldwyn-Mayer etc. vs. Bijou Theatre Co. etc., (D. C. Mass. 1933) 3 Fed. Supp. 66, 74; Twentieth-Century Fox Film Corp., vs. Peoples Theatres of Alabama, (D. C. Ala. 1938) 24 Fed. Supp. 793. The above cases concerned contracts containing specified exhibition dates. An oral license of copyrighted material would give no greater right to use than would a license contained in a written contract, although the copyright proprietor's remedies might well be affected by the terms of the written contract. We think the above cases apply equally to the oral license.

As to the 1952 television show, Loew's protested promptly on hearing of its presentation. It claimed infringement. The fact Loew's did not then com-

mence an action is not a waiver. The dispute over the alleged infringement was never settled.

With this background existing, defendants commenced the preparation and production of the 1953 television show. Loew's on learning about the matter on June 9, 1953, promptly brought this action on June 10, 1953. Defendants in their brief state that they "in reliance upon plaintiff's conduct, incurred financial obligations" in connection with the 1953 show. We can perceive of no conduct on which defendants were entitled to rely. Defendants' expenditures were made after notice they had infringed by the 1952 showing.

In any event there was no undue delay in commencing the action even as to the 1952 showing. The period involved was from January 27, 1952, to June 9, 1953. Moreover, there are authorities for the proposition that delay alone is not sufficient to establish laches, but that the delay must be inexcusable and prejudicial to the defendant; in other words, that there exist reliance on the unexcused delay by the defendants to their prejudice. Major vs. Shaver, (D. C. Cir. 1951) 187 F. 2d 211, 212; Shaffer vs. Rector Well Equipment Co., (5 Cir. 1946) 155 F. 2d 344, 345; Rome Grader & M. Corp. vs. J. D. Adams Mfg. Co. (7 Cir. 1943) 135 F. 2d 617, 619. We find the defense of laches bad.

VI.

Unfair Competition

In the third count, Loew's charges unfair competition and alleges the trade name "Metro-

Goldwyn-Mayer" and the title "Gaslight" have each acquired a secondary meaning.

Loew's does not seriously urge this claim and no part of its briefs have been devoted to it. We find the plaintiff has failed to meet its burden of proof.

VII.

Relief Granted

The first cause of action involves the 1952 T. V. production, exhibited June 27, 1952. No threat has been made to again exhibit this production. Claim for damages have been waived as to all counts of the complaint. In view of the relief granted on the second cause (infra) injunctive relief on the first cause of action will be denied.

The second cause of action incorporates the allegations of the first and then alleged the facts concerning the 1953 T. V. production. The pretrial stipulation provides that defendants intend to and will exhibit these 1953 T. V. film unless restrained by the court. Plaintiff is clearly entitled to injunctive relief on this cause. The fact that the first cause is incorporated by reference in the second, does not hinder relief—if anything it aids. The 1952 and 1953 productions are very alike. Both infringe plaintiff's copyright. Thus the threatened showing of the 1953 impounded film is an equivalent of another showing of the 1952 production.

The court in is discretion may award attorney's fees to the prevailing party in a copyright infringe-

ment action. 17 U. S. C. A. §116. However, the question presented in this case was a nice one; there were no authorities squarely in point to guide the litigants or their counsel. After plaintiffs' commencement of the action, the matter has been treated as a test case. We think the interest of justice would be best served by refusing to award attorney's fees.

Plaintiff will prepare and serve findings of fact, conclusions of law and a decree within the time allowed by the Rules.

Footnotes

[1]Hamilton was joined as *plaintiff through the* abundance of caution of plaintiff's counsel. It was stipulated at the trial that this action involves solely the alleged violation of Loew's copyright. We do not reach questions concerning an author's alleged right to a character he has created. See Warner Bros. Pictures vs. Columbia Broadcasting System, (So. Cal. D. C. 1951) 102 F. Supp. 141, 147; affirmed and modified 216 F. 2d 945; cert. den. —— U. S. ——; Burtis vs. Universal Pictures Co., Inc., (1953) 40 Cal. 2d 823, 835.

[2]Under the British Copyright Act of 1911, publication is defined as "the issue of copies of the work to the public, and does not include the performance of a dramatic of musical work * * *". Unpublished works are fully protected by copyright if the author "was at the time of the making of the work a British subject." Copyright protection runs during the life of the author and for 50 years after his death. Hamilton is still alive.

[3]Hamilton received a Certificate of Copyright Registration. It is conceded Hamilton had a valid copyright.

[4]The republication in 1942 contained notice of the 1939 copyright by Hamilton and the additional words, "Copyright 1942 (Acting Edition) by Patrick Hamilton." Hamilton received a Certificate of Registration from the Registrar of Copyrights. No issue is raised concerning the validity of this copyright.

[5]No attack is made on the assignment. Nor are we concerned with its scope or extent or type of right transferred to Loew's. Loew's paid $150,000 for its rights.

[6]The motion picture photoplay "Gaslight" was first published with Loew's notice of copyright affixed, on May 5, 1944. Loew's received a Certificate of Registration. No issue is raised as to the validity of the copyright.

[7]The terms burlesque and travesty are not used here in a technical sense. See infra for definitions thereof.

[8]A process of recording any event on motion picture film for later broadcast or rebroadcast over television networks or stations.

[9]In view of the clear evidence of a substantial taking, we do not burden this decision with a comparison of dialogue.

I. Generally

Benny TV Program

1. Locale: London.
2. Period: 1871 when story begins.
3. Main setting: Gloomy old 4-story house.

MGM's "Gaslight"

1. Locale: London.
2. Period: "Early 1870's" when story begins.
3. Main setting: Gloomy, old 4-story house.

4. Characters: (TV Program)

(a) Husband "Charles Mannigham" (played by Benny) murdered a woman *15* years ago in this very house; married present wife so that "in the guise of an English gentleman" he can pursue search for jewels of murdered woman. He is following plan of driving his wife insane. He goes out nightly, sneaks back into attic to search. Is finally captured by man from Scotland Yard.

(b) Wife, "Bella Manningham," much in love with husband; pained that he leaves her alone night after night; worried she is losing mind; asks for his sympathy; she is victim of husband's plan to drive her insane; learns of husband's past; asks to see husband alone before he is taken away, and taunts him then calls Inspector.

4. Characters: (MGM's "Gaslight")

(a) Husband "Gregory Anton" (played by Charles Boyer) murdered a woman *10* years ago in this very house; married present wife (who inherited house) so he can pursue search for jewels of murdered woman. He is following plan of driving his wife insane. He goes out nightly, sneaks back to attic to search. Is finally caught by man from Scotland Yard.

(b) Wife, "Paula Anton," much in love with husband; pained that he leaves her alone nightly, fears that she is losing mind; asks for husband's sympathy; she is victim of husband's plan to drive her insane; learns of husband's past; asks to see husband alone before he is taken away, and taunts him then calls Inspector.

(c) Scotland Yard Inspector (TV Program) "Inspector" (played by Noble).

(c) Scotland Yard Inspector (MGM's "Gaslight") "Brian Cameron" (played by Joseph Cotton).

[TV Program and "Gaslight"]

Has been watching house for some time; comes to call on wife when husband out; tells her of husband's past, the murder of a woman in this house years ago; in talking with wife, Inspector gets her to admit she knows it is her husband prowling in the attic who makes strange noises there at night. Upon return of husband, Inspector has hidden, but appears when husband is bullying wife; places husband under arrest; allows wife to talk with husband alone a few moments while he waits outside door, then at her call, comes back and takes husband away into custody. We feel there is affection between Inspector and wife.

(d) Maid "Elizabeth"

Questioned by husband about picture out of place; denies touching it.

(d) Maid "Elisabeth"

Questioned by husband about picture out of place; denies touching it.

(e) Other servant in house: (TV program.)

Butler, "Jeeves."

(e) Other servant in house (MGM's "Gaslight.")

Maid, "Nancy."

II. Story Points.

(a) Husband pursuing a sinister, diabolical scheme to drive wife crazy.

(b) Husband murdered a woman years ago in this very house.

(c) Husband marries present wife, comes to this very house, so he can search for jewels of murdered woman, in attic.

(d) In order to search, husband leaves wife night after night, and pretends he is going elsewhere, actually coming back to own attic.

(e) Husband's method of driving wife insane, includes following:

(1) Telling her she is always forgetting things;

TV program: Wife "doesn't remember" things she does, husband tells her.

MGM script: Wife inclined to lose things and forget things, husband tells her.

(2) Puts picture(s) out of place, then accuses wife of having done this and forgotten it:

TV program: Turns 2 pictures upside down.

MGM script: Takes little picture off wall and hides it.

(3) Confines wife to her room, and he goes out night after night.

(4) Humiliates wife in front of servant(s) by calling her in to be questioned when picture found out of place.

TV program: (Maid, Elizabeth, is quizzed.)

MGM script: (Maids, Elizabeth and Nancy are quizzed.)

(5) Husband's searching for jewels in attic, has following effects which increase idea of wife's insanity:

(a) When he turns on gaslight in attic, lights in her room go lower; then later when he turns off gaslight in attic, her lights in her room come up higher again.

(b) His search in attic (makes queer noises) (has queer effect).

TV program: Wife complains of headaches, but when Inspector explains her husband was up in attic searching for jewels she says her headache is gone.

MGM script: Wife thinks she's hearing imaginary footsteps in attic,

(f) Husband calls in servants, after he has misplaced picture, questions them, in order to cast suspicion on his wife.

(g) Husband tells wife she is getting hysterical, and should sit down and calm herself:

(h) Husband asks why wife does these crazy things; says she is insane:

(i) Running idea that wife forgets things:

(j) Gaslights go down after husband leaves, and come up just before he returns:

(k) Wife pleads for sympathy and kindness from husband:

(l) Inspector from Scotland Yard, has been watching house, comes to visit wife when husband out; tells her of husband's dark past, reassures her of her sanity, captures husband.

(I.) Watching house.

(II.) Visits wife.

(III.) Tells of husband's crime.

(IV.) Reassures wife of sanity.

(V.) Captures husband.

(m) Husband returns, starts to bully wife again, when Inspector comes on scene.

(n) Wife asks to speak to husband alone, before Inspector takes him away; Inspector finally agrees and waits outside room within call.

TV program: Inspector ties up husband because wife asks to talk with him alone.

MGM script: Inspector already had tied husband up.

(o) Husband, tied up in chair, tries to talk wife into getting knife and cutting him loose.

TV program: Knife in desk.

MGM script: Knife in cupboard.

(p) Wife pretends she is going to release husband by cutting bonds with knife, then frightens him by implying instead she will kill him with the knife, then calls Inspector.

[10]U. S. Const. Art. 1, §8. Clause 8.

[11]Act of May 31, 1790 c. 18, 1 Stat. 124.

[12]The original subjects of copyright under Act of May 31, 1790, were confined to maps, charts, or books. Historical and other prints were added by Act of April 29, 1802. Musical compositions were included in the revision of 1831 (Act Feb. 3, 1831, c. 16, 4 Stat. 436). Under Act Aug. 18, 1856, authors of dramatic compositions, in addition to the sole right to print and publish, were given sole right to act, perform and represent such composition. Photo-

graphs and negatives thereof were provided for under Act. March 3, 1865, c. 126. 13 Stat. 540. The Act of July 8, 1870, c. 230, §86, 16 Stat. 212 which was superseded by provisions of the Act of March 4, 1909, c. 320, 35 Stat. 1082, included also painting, drawing, chromo, statue, statuary, as well as models or designs, as proper subjects of copyright.

[13]Act of Feb. 3, 1831, c. 16; 4 Stat. 436.

[14]Occasionally, the courts have referred to the right to use the non-copyrightable material in a copyrighted work as "fair use." (Sheldon vs. Metro-Goldwyn Pictures Corp., supra, 81 F. 2d at 54; Towle vs. Ross, supra, 32 F. Supp. at 127; Warner Bros. Pictures vs. Columbia Broadcasting System, S. D. Cal 102 F. Supp. 141, 148-149). In that meaning the question is only the conventional one in copyright cases, i.e., was the appropriated material, copyrightable. Primarily, however, the concept referred to as "fair use" relates to the extent to which copyrightable or protectible material may be used without express license.

[15]Chaffee, Reflections on the Law of Copyright, 45 Col. Law Review 503; Drone on Copyrights, p. 398; Nicholson, Manual of Copyright Practice, p. 86; Shaw, Literary Property in the United States, pp. 67-71; DeWolf, An Outline of Copyright Law, pp. 97-98.

[16]Yankwich, What Is Fair Use. Vol. 22, Univ. of Chicago Law Review, 203-209.

[17]Amdur on Copyright Law and Practice, p. 757; Ball on Copyright and Literary Property, p. 287; Nicholson, Manual of Copyright Practice, p. 86; Lawrence vs. Dana, (Cir. Ct. Mass. 1869) 15 Fed. Cas. 26, 60 (Case #8136); Folsom vs. March, (Cir. Ct. Mass., 1841), 9 Fed. Cas. 342 (Case #4901).

[18]West Pub. Co. vs. Edward Thompson Co., (2 Cir. 1910) 176 Fed. 833, 838 (dictum; other acts infringed).

[19]Edward Thompson Co. vs. American Law Book Co., (2 Cir. 1903) 122 Fed. 922.

[20]W. H. Anderson Co. vs. Baldwin Law Book Co., (6 Cir. 1928) 27 F. 2d 82, 89, but taking of citations held an infringement.

[21]G. Ricordi & Co. vs. Mason (D. C. N. Y., 1911), 201 Fed. 182, 184; aff. (2 Cir. 1913) 210 F. 277.

[22]Kipling vs. G. P. Putnam's & Sons, (2 Cir. 1903) 120 Fed. 631, 635.

[23]Dun vs. International Mercantile Agency, (Cir. Ct. N. Y. 1903) 127 Fed. 173.

[24]College Entrance Book Co. vs. Amsco Book Co., (2 Cir. 1941) 119 F. 2d 874, 876.

[25]Henry Holt and Co., Inc., vs. Liggett & Myers Tobacco Co., (D. C. Pa. 1938) 23 F. Supp. 302.

[26]Chicago Record-Herald Co. vs. Tribune Ass'n. (7 Cir. 1921) 275 Fed. 797.

[27]Toksvig vs. Bruce Pub. Co., (7 Cir. 1950) 181 F. 2d 664.

[28]Johns & Johns Printing Co. vs. Paull-Pioneer Music Corp. (8 Cir. 1939) 102 F. 2d 282.

[29]Harms vs. Cohen, (D. C. Pa. 1922) 279 Fed. 276, 278.

[30]What Is Fair Use, 22 Univ. of Chicago Law Review, 203, 209.

[31]It will be noted that the words "burlesque," "parody," "satire" and "travesty" are often used interchangeably. They do have certain technical distinctions, i.e., "parody" is usually the imitation of style of form; "satire" often carries the connotation of bitterness; "travesty" is synonymous with "burlesque" but is sometimes used to mean a long burlesque.

Encyclopoedia Brittanica, Fourth Ed. Vol. IV. page 423, "Burlesque. A form of the comic in art, consisting broadly in an imitation of a work of art

with the object of exciting laughter, by distortion or exaggeration, by turning for example, the highly rhetorical into bombast, the pathetic into the mock-sentimental, and especially by a ludicrous contrast between the subject and the style, making gods speak like common men and common men like gods. While parody (q. v.) also based on imitation, relies for its effect more on the close following of the style of its counterpart, burlesque depends on broader and coarser effects."

[32]Another cartoon strip case is Nat'l Comics Publications vs. Fawcett Publications, (2 Cir. 1951) 191 F. 2d 594, holding a trial judge improperly dismissed a complaint alleging that Fawcett's Captain Marvel in Whiz Comics, and other magazines, infringed the Superman strip.

[33]The use of the words "any other version" inserted in the statute by Act of Mar. 4, 1909, c. 320, 35 Stat. 1075, probably was only intended to re-enact existing law. See G. Ricordi & Co. vs. Mason, (D. C. N. Y. 1911) 201 Fed. 182, affirmed per curiam 210 Fed. 277; and Corcoran vs. Montgomery Ward & Co., (9 Cir. 1941) 121 Fed. 2d 572.

[34]King cites Lawrence vs. Dana, (Cir. Ct. Mass. 1869) 15 Fed. Cases 26, 59-60 (Case #8136) and in addition to the quote, paraphrases certain other language of Justice Clifford. The word "literary" in King appears as "literal" in Lawrence vs. Dana. We find practically the exact quote in the case of Simms vs. Stanton, (Cir. Ct. N. D. Cal 1896) 75 Fed. Rep. 6, 9, except the word "literal" is used instead of "literary." Simms probably took the quote from Lawrence vs. Dana.

[35]The holding of the case is approved in Mazer vs. Stein (1954) 347 U. S. 201, involving a like problem. Rosenthal vs. Stein, (supra) was one of the cases creating the conflict in Circuits which caused the Supreme court to allow certiorari in Mazer vs. Stein.

[36] If, therefore, it were necessary for me to express an opinion upon this aspect of the case, I should decide that on this ground also plaintiff fails." (114 L. T. Reports 356). (1916) 1 Ch. 261, 269

7 Halsbury's Laws of England, (2d Ed. 1932, edited by Lord Hailsham) p. 576, Sec. 893, "* * * if * * * a substantial part of an author's work is taken, it is not material to consider whether the user is fair or unfair * * *". Their follows a note commenting on the Glyn case and the following, "* * * since the * * * Copyright Act of 1911 * * * whereby reproduction in any material form was made an infringement of copyright there can be no justification for a user of copyright material based upon a supposed right to abridge or burlesque."

Copinger & Skone James, Law of Copyright, 8th Ed. 1948) p. 132 states,

> "If the burlesque consists of what is, in substance, a new work parodying an existing one but not making substantial use of its language or incidents, it is submitted there is no infringement. But a work which slavishly used the plot and incidents of another would not be defensible under the cloak of burlesque." (Emphasis added.)

A. D. Russell-Clark Copyright and Industrial Design (1951) p. 63, after citing Carlton vs. Mortimer, McGillivray's Copyright cases (1917-23) 194, (the second of defendant's English cases), states,

> "The Court held that these two incidents did not constitute a substantial part of the novel, especially in view of the fact that whereas the incidents in the novel were serious in nature, in the skit they were treated entirely as burlesque. This case raises the question of whether a burlesque can infringe a serious work. It is submitted that it may be an infringement, the material question for consideration being whether a 'substantial part' of the copyright work is or is not reproduced." (Emphasis added.)

[38]The titles were, "Tarzan of the Apes" and "Warzan and His Apes." Under American law the title to a work probably would not be protected by copyright law. Arnstein vs. Porter (2 Cir. 1946) 154 F. 2d 464; Warner Bros. Pictures Inc., vs. Majestic Pictures Corp., (2 Cir. 1934) 70 F. 2d 310, 311; Weissman vs. Radio Corp. of America, (D. C. N. Y. 1948) 80 F. Supp. 612; See, 23 A. L. R. 2d 216, Sec. 18, pp. 300; but may be protected under the law of unfair competition. Warner Bros. Pictures Inc., vs. Majestic Pictures Corp., (supra) p. 311; See 23 A. L. R. 2d 216, Sec. 19, p. 302.

[39]See note No. 37.

[40]Nicholson, Shaw, Spring and Lindey. See preface to the works. Shaw is not even a lawyer.

[41]For example, although the short excerpt from Weil which defendants give might indicate his accord with them, the fact is that in another section, citing Green vs. Luby, supra, 177 Fed. 287, to his text, he affirms the principle that even burlesque or parody infringes if it takes substantial copyrighted material from the plaintiff. (Weil, Law of Copyright, p. 418, sec. 1097). In the passages quoted from Ball only fair use in general terms is dealt with. But when Ball, elsewhere in his treatise, refers to Green vs. Luby, supra, 177 Fed. 287, and Hill & Whalen vs. Martell, supra, 220 Fed. 359, his discussion indicates clearly that he considers them to place limits on the right to appropriate copyrighted material for burlesque. (Ball, Law of Copyright and Literary Property, pp. 290-292, 422.) Similarly Amdur refers to these decisions as showing that fair use does not permit of substantial taking by way of burlesque. (Amdur, Copyright Law and Practice, pp. 748-749, 759-762, 777.)

[42]Risks and Rights, pp. 183-186.

[43]Plagiarism and Originality, p. 43.

[44]Dr. Frank C. Baxter, A.B. and M.A., University of Pennsylvania, Ph.D. University of Cam-

bridge and presently a professor of English Literature at the University of Southern California, was called as an expert witness by defendants. He reviewed the use of burlesque throughout the history of literature. In addition he summarized as follows:

1. Burlesque is a form of comic art, is as old as literature.

2. Burlesque "could not use bitterness or rancor. Burlesque is a happy thing."

3. Burlesque is rarely personal.

4. Burlesque is rarely of a whole work of art.

5. Burlesque changes the tone of the original.

6. It rarely bothers itself with the evil or the sham, the ignominious and the failure.

7. Burlesque is a sort of compliment.

8. It is a manifestation of the comic spirit.

9. Burlesque historically has flourished in those societies where there has been most democratic liberty.

10. Burlesque is a happy toying with serious things.

11. The stage has always laughed at itself.

12. There have been few important novels, verses or plays that have not been burlesqued.

[45]After Dr. Baxter listed 18 modern plays or works of which he said burlesques had been made, the following question was asked:

"In that connection, in your investigation of course you had no way to ascertain whether or not there was permission?

"The Witness: No, I had no knowledge of that." (Tr. 51.)

And on cross-exam. "Q. Then, having made that much of an analysis, did you carry your researches on to ascertain whether or not the parody or burlesque was issued with the permission of the author of the original?

"A. No, no." (Tr. 86.)

Dr. Baxter was asked this question. "Q. In the history of literature, is there any evidence that these

numerous burlesques were done with the permission of the owner of the original?

"A. I know of no case. It may have been, of course, but I rather doubt it. These are independent arts." (Tr. 53.)

[46]Dr. Baxter's testimony.

"Q. Anyway, with regard to these various burlesques that you read in preparation for your testimony, did your investigation extend to ascertaining with respect to the original or model, or the work which was being burlesqued or parodied, whether that work was one which was protected by any copyright law, or whether it was in the public domain at the time of the appearance of the burlesque?

"A. No, I did not." (Tr. 86.)

"Q. Further, in analyzing these various works * * * did you make any investigation to discover whether the state of the law was such at the time that the burlesque appeared, as to make the taking whatever it might have been, lawful or unlawful?

"A. No, I did not. Legal consideration, of course, is beyond my powers." (Tr. 88.)

[47]Although the court permitted in evidence over plaintiffs' objection, this material from paragraph 13 of the pretrial stipulation, listing Benny's other burlesques, obviously the fact that Benny burlesqued other plays or pictures is no defense to this action, if his acts herein were improper.

[48]Dr. Frank Baxter gave a definition of burlesque, as follows: "I think that it is a very excellent synonym for burlesque, take-off from something. It does not parallel in the sense that it just recreates the thing in a new tone, but it takes off from it, selectively, this element, this element, this element, in order to identify this is a burlesque that B is making of A, but it takes off into the blue with all sorts of things. It introduces extraneous materials; it takes one little detail and puffs it up beyond its significance in the original. It leaves out much, but it constantly comes back, so to speak, to refresh it-

self to the original, and then takes off again. But in no sense parallels the original." (Tr. 66-67.)

[49]See also W. H. Anderson Co. vs. Baldwin, (6 Cir. 1928) 27 F. 2d 82, 89; Karll vs. Curtis Pub. Co., (D. C. Wisc. 1941) 39 F. Supp. 836 at 837; Sampson & Murdock Co. vs. Seaver-Radford Co. (1 Cir. 1905) 140 Fed. 539, 541-42.

[50]CBS had no connection with this show.

[Endorsed]: Filed May 6, 1955.

[Endorsed]: No. 14928. United States Court of Appeals for the Ninth Circuit. Jack Benny, Appellant, vs. Loew's Incorporated, et al., Appellees. Columbia Broadcasting System, et al., Appellants, vs. Loew's Incorporated, et al., Appellees. Supplemental Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed February 8, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[fol. 275] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—August 15, 1956

(Omitted in printing)

[fol. 276] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—December 26, 1956

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 277] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRUIT

No. 14,928

JACK BENNY, Appellant,

v.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON, Appellees.

COLUMBIA BROADCASTING SYSTEM, INC., and AMERICAN TOBACCO COMPANY, Appellants,

v.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON, Appellees.

Upon Appeals from the United States District Court for the Southern District of California, Central Division

Before: Bone, McAllister, and Chambers, Circuit Judges.

OPINION—December 26, 1956

McALLISTER, Circuit Judge:

Patrick Hamilton, an English author and a British subject, some time prior to December, 1938, conceived and wrote an original play entitled, "Gas Light." It was published and protected by copyright in February, 1939. Shortly thereafter, it was publicly performed in England, first, in Richmond, and later, in London. On December 5, 1941, it was produced as a play in New York under the [fol. 278] name, "Angel Street," and had a successful run of 1,295 consecutive performances, extending over a period of more than 37 months.

On October 7, 1942, the exclusive motion picture rights for "Gas Light" were acquired by Loew's, Inc., better known under its trade name of Metro-Goldwyn-Mayer.

Loew's spent $2,458,000 in the production and distribution of the motion picture photoplay of "Gas Light." The

actual making of the film extended over a period of more than two and a half years.

In producing the motion picture, Loew's acquired the services of three great artists in the cinema field, Charles Boyer, Ingrid Bergman, and Joseph Cotton.

The photoplay, "Gas Light," was exhibited in the United States and fifty-six foreign countries. Approximately fifty-two million persons paid admission to see it. The gross receipts in rentals for the play amounted to $4,857,000.

There is no question of the right of the dramatic work to protection under the copyright laws of both Great Britain and the United States.

On October 14, 1945, Jack Benny, a successful performer in the field of comedy, after securing Loew's consent to present a parody of "Gas Light" on radio, caused to be written, produced, performed and broadcast over a national radio network a fifteen minute burlesque of the play. In preparing the program, the radio writers for Benny had access to the acting script of the motion picture, "Gas Light."

More than six years later, on January 27, 1952, the Columbia Broadcasting System caused to be written and produced a half-hour-long television show burlesquing "Gas Light," with Jack Benny in the leading role. It was broadcast over the Columbia Broadcasting System network and was "sponsored" by the American Tobacco Company. Neither Mr. Benny nor the Columbia Broadcasting System nor the American Tobacco Company secured consent from Loew's or Mr. Hamilton to publish and broadcast the television burlesque, or, as it is sometimes called, the parody.

Immediately after the presentation of the television show, Loew's dispatched a telegram to the Columbia Broadcasting [Vol. 279] System, notifying that company that Loew's was the owner of the exclusive rights of production and recording of the play, "Gas Light," and adaptations thereof by means of talking films, sound tracks, and television; that Columbia had used substantial portions of the play in its television program; and that Loew's intended to enforce its rights against infringement. A short time thereafter, counsel for Columbia replied to the above telegram, informing Loew's that its burlesque appropriation of the play, "Gas

Light," was a "fair use" of the dramatic work, and that Columbia had the right to parody it as it did in the television show. Loew's, in turn, informed Columbia that the burlesque television show constituted an infringement of the copyright of "Gas Light"; and when Columbia prepared for a similar presentation over several television channels, Loew's filed this action, and secured a temporary restraining order.

Upon a trial of the issues, the district court found that the Benny television play was copied in substantial part from Loew's motion picture photoplay, "Gas Light"; that the portion so copied was a substantial part of the copyrighted material in such photoplay; and that the Benny television presentation was an infringement of the copyrighted photoplay, "Gas Light." The court, accordingly, granted injunctive relief, restraining the showing of the television play, all of which appears in the able and comprehensive opinion by Judge James M. Carter, reported in 131 F. Supp. 165.

On review, the chief contention advanced by appellants is that the burlesque presentation of "Gas Light" was a "fair use" of appellees' photoplay; that, although the play was copyrighted, and neither Benny, Columbia, nor the American Tobacco Company had received any consent on the part of the copyright owners to adapt the play in the way they did, nevertheless, they had the right to adapt the original copyrighted dramatic work of the author of the play and of the photoplay version as a burlesque, and to present, vend, and appropriate it thus, for their own profit.

Appellees submit that the Copyright Act insures to the copyright owners the exclusive right to any lawful use of their property, whereby they may get a profit out of it. They further submit that there is no doctrine of fair use [fol. 280] which justifies the appropriation of substantial copyrighted material of a dramatic work without the consent of the copyright owner, whether such appropriation is made for the purpose of pirating the work openly, or under the guise of a burlesque or a parody.

In considering the law and its application to this case, the facts themselves are most important. The play is a remarkable dramatic production. As outlined by appellees and somewhat supplemented by the record, the play tells the story of a man who sets out upon a deliberate plan to drive

his wife insane. He is motivated in this endeavor by the need of having access to a house which was inherited by his wife and in which they live. Some years prior, he had murdered the aunt of his wife for the sake of some valuable jewels which he had intended to steal, but in which he had been frustrated. His method of achieving his objective of finding the jewels without the wife's knowledge, and, at the same time, avoiding her suspicion, is to keep her attention diverted by inducing in her the belief that she is having hallucinations, suffering great lapses of memory, and gradually losing her mind. He does this by abstracting, without her knowledge, articles which he had entrusted to his wife, and by removing a portrait from the wall, making her believe that she had been responsible for the misplacement of the articles and the removal of the picture, of which she had lost all recollection. He fosters such a belief in her, in part, by causing the servants to bear witness that they did not remove the portrait. The suspense aroused by the picture is focused upon whether he will succeed in his scheme of finding the jewels and driving his wife insane. He fails, because of the intervention of a detective from Scotland Yard who, suspicious of the husband's conduct, has become interested in, and then obviously enamoured, of the heroine. The detective apprehends the husband at the climax of the plot, binds him to a chair in his own home to secure his arrest, and then reveals the truth, which he has learned, to the wife. At her request, she is given an opportunity to talk to the husband, who attempts once again through his personal charm, to subdue her to his will. She, however, resists. In this scene, at her husband's request, she procures a knife, which he has kept nearby. The suspense is heightened by the question whether she will use the knife to cut her husband's bonds, as he has asked her to do, or whether she has come to a determination to [fol. 281] kill him. She does neither, but contents herself with denouncing him, and turning him over to the police.

A comparison of appellees' "Gas Light" and the Columbia television show discloses the following: The locale of Loew's photoplay is in the early 1870s when the story begins. In the burlesque television show, the story begins in 1871. The setting is a gloomy old four-story Victorian house. The characters are a murderer, his wife, a detective

from Scotland yard, and a maid. The murderer has killed a woman ten years before in this house. (In the Columbia television show, the time of the murder is fifteen years before.) Thereafter, the murderer marries the young girl who has inherited the house from the murdered woman, so that he can pursue his search for the jewels for which he had committed the crime. All of the foregoing is the same in the Columbia television show except that it does not mention that the wife had inherited the house.

In carrying out his objective, the husband follows the above mentioned plan of driving his wife insane, so that she may eventually be placed in an asylum. He leaves the house nightly and then secretly return through another entrance to the attic to search for the jewels. In one of the incidents, the husband questions, in the presence of the wife, the maid, concerning the picture which has been removed from its place on the wall, in spite of the wife's begging the husband not to humiliate her before a servant. The maid denies having touched the picture, and the husband uses this incident also to make his wife believe that she has lost her mind. The husband is finally caught by the Scotland Yard detective, who has deduced that he is the murderer.

During the entire play, except at the climax, the wife is deeply in love with her husband and is grieved that he leaves her alone each night. Because of the husband's machinations, she fears that she is losing her mind and repeatedly begs for the sympathy and understanding of her husband, who coldly repels her. The detective from Scotland Yard, who has been noticing the husband's suspicious actions and watching the house for some time, calls on the wife when her husband is away and tells her of his past and of the murder several years previously. In talking with the wife, the detective gets her to admit that she knows it is her husband who is prowling in the attic and making the [fol. 282] mysterious noises there at night. Upon the return of the husband, the detective conceals himself in the house, but appears as the husband commences to bully his wife. He then places the husband under arrest, allows the wife to talk with him alone for a few minutes while he waits outside the door, and then, at her call, returns and

takes him into astody. The foregoing is similar in both the photoplay and the television play.

Title 17 U.S.C.A., Section 4, provides, among other matters, that a copyright owner shall have the exclusive right to make any other version of the copyrighted work; to dramatize it, if it be a nondramatic work; to convert it into a novel or other nondramatic work, if it be a drama; to arrange or adapt it, if it be a musical work; to perform the copyrighted work publicly, if it be a drama; to make or to procure the making of any transcription or record thereof, by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever.

The district court found, as a fact, that appellants' television play was copied by them, in substantial part, from appellees' motion picture photoplay, "Gas Light" and that the "part so copied was and is a substantial part of [appellants' television] play, and of the copyrightable and copyrighted material in [appellees'] motion picture photoplay." The district court found as facts "(1) that the locale and period of the works are the same; (2) the main setting is the same; (3) the characters are generally the same; (4) the story points are practically identical; (5) the development of the story, the treatment (except that defendants' treatment is burlesque), the incidents, the sequences of events, the points of suspense, the climax are almost identical and finally, (6) there has been a detailed borrowing of much of the dialogue with some variation in wording. There has been a substantial taking by defendants from the plaintiffs' copyrighted property." (131 F. Supp. 171) Accordingly, the district court found that appellants were guilty of infringement of appellees' photoplay, "Gas Light."

The photoplay is an original dramatic work. It deals with incidents familiar in life and fiction, but the grouping [f.l. 283] of those incidents presents a novel arrangement of events; and it is that originality which is protected by copyright.

A comparison of the photoplay and the television play

indicates how much was copied. If the material taken by appellants from "Gas Light" is eliminated, there are left only a few gags, and some disconnected and incoherent dialogue. If the television play were presented without appellants' contribution, there would be left the plot, story, principal incidents, and same sequence of events as in the photoplay.

A review of the record, a comparison of the scripts of appellees' photoplay and appellants' television play, and a viewing of the motion picture photoplay and the television play, as projected upon the screen—all convince us that the findings of fact of the district court that appellants copied the photoplay in substantial part, and that the part so copied was a substantial part of the television play and of the material in appellees' photoplay, are clearly supported by the evidence.

Appellants' chief defense is that the use which they made of appellees' photoplay in their television play was a fair use, by reason of the fact that the material which they appropriated from the motion picture, "Gas Light," was used in the creation of a burlesque, and that by reason of such circumstance, they are not guilty of infringement.

The so-called doctrine of fair use of copyrighted material appears in cases in federal courts having to do with compilations, listings, digests, and the like, and is concerned with the use made of prior compilations, listings, and digests. In certain of these cases, it is held that a writer may be guided by earlier copyrighted works, may consult original authorities, and may use those which he considers applicable in support of his own original text; but even in such cases, it is generally held that if he appropriate the fruits of another's labors, without alteration, and without independent research, he violates the rights of the copyright owner. In these instances, as has been said, there are certain to be considerable resemblances, "just as there must be between the work of two persons compiling a directory, or a dictionary, or a guide for railroad trains, or for automobile trips. In such cases the question is whether [fol. 284] the writer has availed himself of the earlier writer's work without doing any independent work himself." *Chautauqua School of Nursing* v. *National School of Nurs-*

ing, 238 F. 151, 153 (C.C.A. 2). See also cases digested in 18 F. Dig., Copyrights, Section 55. But up to the time of the present controversy, no federal court, in any adjudication, has supposed that there was a doctrine of fair use applicable to copying the substance of a dramatic work, and presenting it, with few variations, as a burlesque. The fact that a serious dramatic work is copied practically verbatim, and then presented with actors walking on their hands or with other grotesqueries, does not avoid infringement of the copyright. "Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that wholesale copying and publication of copyrighted material can *ever* be fair use." *Leon v. Pacific Telephone & Telegraph Co.*, 91 F. 2d 484, 486 (C.C.A. 9). (Emphasis supplied) Whether the audience is gripped with tense emotion in viewing the original drama, or, on the other hand, laughs at the burlesque, does not absolve the copier. Otherwise, any individual or corporation could appropriate, in its entirety, a serious and famous dramatic work, protected by copyright, merely by introducing comic devices of clownish garb, or movement, or facial distortion of the actors, and presenting it as burlesque. One person has the sole right to do this—the copyright owner, inasmuch as, under Title 17 U.S.C.A., Section 1, he has the exclusive right to make any other version of the work that he desires. He can have it read or sung or danced or pantomimed or burlesqued, because, in the language of the statute, he has the sole right to "exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever."

The fact that it has been Mr. Benny's custom to present from time to time, his, or the Columbia Broadcasting System's "version" of various dramatic works during the past twenty-five years, is no defense to this action for infringement of copyright. Appellants cannot copy and present another's dramatic work as they have in the instance before us, unless they receive the consent of the copyright owner.

An apparently alternative contention that the presentation of the burlesque was, in effect, literary or dramatic [fol. 285] criticism and, therefore, not subject to an action

for infringement of copyright, would seem to be a parody upon the meaning of criticism.

The record in this case includes a beguiling dissertion on the history of the drama, of English literature, of parody, and of burlesque, by Dr. Frank C. Baxter, a widely recognized and eminent authority in this field of study. Briefs of appellants' counsel, too, disclose a wealth of literary appreciation. However, there is only a single decisive point in the case: One cannot copy the substance of another's work without infringing his copyright. A burlesque presentation of such a copy is no defense to an action for infringement of copyright. As was said by the district judge, a "parodized or burlesque taking is to be treated no differently from any other appropriation; that, as in all other cases of alleged taking, the issue becomes first one of fact, i.e., what was taken and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists." (131 F. Supp. 183)

The finding of the district court that appellants had copied a substantial part of appellees' photoplay is clearly supported by the evidence. The judgment is affirmed upon the findings of fact and conclusions of law of the district court and for the reasons set forth in the opinion of Judge James M. Carter.

[File endorsement omitted.]

[fol. 286] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14928

JACK BENNY, Appellant,

vs.

LOEW'S INCORPORATED, ET AL., Appellee

COLUMBIA BROADCASTING SYSTEM, ET AL., Appellants

vs.

LOEW'S INCORPORATED, ET AL., Appellees

JUDGMENT—Entered December 26, 1956

Appeals from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

[File endorsement omitted.]

[fol. 287] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 288] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 833

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed April 29, 1957

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5672-1)